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No. 414.

In the Supreme Court of the United States

October Term, 1956.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

CLIF. LANGSDALE,
922 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, A. F. L., District No. 2, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 6, 1956.

Opinions Below.

The opinion of the Court of Appeals is reported at 232 F. 2d 393 and printed as Appendix A hereto, pp. 19-23, *infra*. The findings of fact, conclusions of law and the order of the National Labor Relations Board (R. 265-309, 336-343) are reported in 110 N.L.R.B. 2116 and printed as Appendix B hereto, pp. 24-79, *infra*.

Jurisdiction.

The decree of the Court of Appeals was entered on June 6, 1956 (R. .....). A petition for rehearing duly filed by the petitioner (R. .....), was denied on June 6, 1956 (R. .....). The jurisdiction of this Court is invoked under Section 10 (e) and (f) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

Questions Presented.

1. Whether a union in the interests of promoting safety in the building construction industry may properly classify its members on the basis of the industry in which they are employed and establish preferential hiring for persons who have acquired a classification showing prior experience in that industry, without thereby restraining or coercing employees in violation of Section 8(b)(1)(A), or causing an employer to encourage or discourage membership in a union by discrimination in regard to hire within the meaning of Section 8(b)(2), of the National Labor Relations Act, as amended.

2. Whether in a community where all boilermakers were members of the union and there is no evidence that any of them desired to leave the union, the Board may properly infer that the presence of only union members on a job for which no nonunion man had ever applied, estab-

lishes that the employer and the union were not giving effect to a provision in their collective bargaining agreement which specified that all union security provisions which were illegal should remain inoperative unless and until they become legal.

3. Whether an employer and a union may validly enter into a contract specifying the union security provisions which they will desire to be in effect should the law be changed so to permit but expressly providing that the illegal provisions shall remain inoperative unless and until they become legal.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

"Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *

* * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

STATEMENT.

The International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America has for many years classified boilermakers by industry because the work of a boilermaker in one industry differs markedly from the work of a boilermaker in others (R. 85, 170, 172). For instance, the boilermaker in the building construction industry differs in many important respects from boilermakers in railroad shops or navy yards or shipbuilding plants (R. 175). In the building construction industry the boilermaker works aloft on scaffoldings which are often hazardous, not only to his own safety but also to the safety of other workmen and the public (R. 79, 158, 159, 160, 161, 164, 165, 175, 177). In most other industries the boilermaker works in an established plant (R. 175).

The International Brotherhood effects its classification by chartering locals each limited to a given industry (R. 87-88, 91, 94-95, 170-175).[1] In Greater New York City, the community with which we are here concerned, the building construction locals of the International Brotherhood are likewise members of the New York Building Trades Council (R. 77, 82). As such they received quarterly Building Trades cards to distribute to their members (R. 25, 77, 78, 82). The Building Trades quarterly card marks its holder as a man experienced in the building trades in his particular craft (R. 79, 158, 160-161).

District 2 of the International Brotherhood is composed of the five building construction trades locals of the International Brotherhood located in the Greater New York

[1]The Constitution of the International Brotherhood prescribes this form of organization (R. 17-21, 76-79).

City area (R. 80, 82). District 2 is affiliated with the New York Building Trades Council and its constituent locals receive from that Council quarterly Building Trades cards to distribute to their members (R. 77, 82).

The instant case arose out of the efforts of four members of Local 23 of the International Brotherhood to obtain employment on a building construction job without establishing their qualifications as building construction boilermakers. Local 23 of the International Brotherhood is composed of boilermakers employed in the boiler room of the United States Navy Yard in New York City (R. 80, 84, 239). By reason of the nature of their employment, members of Local 23 are classified by the International Brotherhood as qualified and available for employment in the shipbuilding or ship yard industries but not in the building construction industry (R. 86-87, 95, 239). The evidence in the record is undisputed that a man might be an excellent Navy Yard boilermaker without having any ability, experience or efficiency in the building construction industry (R. 95).

Any member of Local 23 who was in fact experienced in the building construction industry was free to transfer his membership to one of the locals in District 2 and to receive a Building Trades quarterly card. Indeed the record shows without dispute that every qualified member of Local 23 who did apply to transfer his individual membership to a local affiliated with District 2 was allowed to do so and was granted a Building Trades quarterly card (R. 191-192, 202-204, 205, 228, 241).

For some reason not apparent from the record the four employees here involved insisted that they had the right to remain classified as shipyard or navy yard boilermakers and at the same time to receive employment in the building construction industry without taking any appropriate

steps to establish their classification and experience in the building construction industry (R. 106-107, 110-111, 114, 121, 123-124, 125-126, 128-129, 144). They did make an unsuccessful effort to have Local 23 admitted into District 2 so that all its members would automatically receive Building Trades quarterly cards (R. 67-68, 80, 82-84). The International Brotherhood refused to permit Local 23 to join District 2 because Local 23 was composed of boilermakers employed in the boiler room of the Navy Yard as distinguished from building construction work which was the industry in which members of District 2 were employed (R. 22-24, 64-65, 82-84, 217-223, 233-235).

The instant case does not involve any discrimination between members of the International Brotherhood of Boilermakers and non-members. Insofar as the record discloses there are no qualified boilermakers in Greater New York City community who are not members. Hagan, the foreman at the Astoria project of Babcock & Wilcox Company, the largest and longest continuing job employing boilermakers in the New York area in the early 1950s (R. 160), testified that no non-union man had ever applied for a job as boilermaker at the project (R. 163). He further testified that the trade was so well organized in New York that he did not know of any non-union boilermakers (R. 163). The exclusive source of supply of skilled boilermakers in New York City is the International Brotherhood (R. 232).

The collective bargaining agreement in effect from July 1, 1950, to June 30, 1953, between the Babcock & Wilcox Company and District 2 of the International Brotherhood contained certain union security clauses as well as a provision making illegal portions of the union security clauses inoperative unless and until they became legal (R. 13-16, 74-75). The collective bargaining agreement was not preceded by any negotiation (R. 74, 184-185). The agreement was identical except as to arbitration provisions with one

effective for the same period of time between Boiler and Plate Work Erecting Contractors' Association, hereinafter called Employer Association, and District 2 (R. 189, 25-38, 13-16). Since the Babcock & Wilcox Company was not a member of the Employer Association, after the agreement was signed with the Association, District 2 mailed a copy to the Babcock & Wilcox Company (74-75). The Babcock & Wilcox Company signed the contract and returned it (R. 74-75).

The uncontradicted testimony of both representatives of the Babcock & Wilcox Company and of representatives of the International Boilermakers was that the union security provisions of the contract were never put into effect due to the "savings clause" which rendered them inoperative until such time as the Taft-Hartley Act was repealed, amended, or interpreted by a court of highest resort so as to permit such union security arrangements (R. 185, 258-259, 261, 262). For the same reason the union security provisions of District 2's contract with the Employer Association were never put into effect (R. 262).

With respect to the Babcock & Wilcox Company it was stipulated by all parties to the suit "that when the foreman refers applicants for employment to the Personnel Office, the Personnel Office may or may not hire them. The Personnel Office may reject and has rejected applicants for employment for various reasons. For example, that the particular applicant for employment is known to the Personnel Office to have a criminal record. Or that the particular applicant for employment is known by the Personnel Office to have worked elsewhere and earlier for the Babcock & Wilcox Company, and to have been deficient in his work. The Personnel Office, however, would not, and has not rejected any applicants for employment because of their affiliation or lack of affiliation in any particular labor organization" (R. 242-243).

Hagan, the foreman employed by Babcock & Wilcox Company, who selected boilermakers and sent them to the Personnel Office for clearance, testified without contradiction as to his method of choosing boilermakers. That he was not influenced in doing so by any uncertainty as to whether all or only portions of the union security clause in the agreement between District 2 and the Babcock & Wilcox Company were inoperative is clear from the fact that he was unacquainted with the provisions and did not even know that there was any contract in existence between District 2 and the Babcock & Wilcox Company (R. 164, 258-259, 261). Hagan chose boilermakers solely with an eye to the safety of men and materials (R. 158-161, 164-165). At the outset of a project when the scaffolding was first going up and the greatest of hazards existed, Hagan tried to get boilermakers with whom he had previously worked and whose experience and ability were within his personal knowledge (R. 158-162, 165, 260-261). Lacking enough such men he looked to applicants' holding of Building Trades quarterly cards as an insignia of their experience and qualification (R. 158-162). At later stages of the project, when more boilermakers were needed and the hazards had diminished, Hagan hired anyone who applied at the gate for a job as a boilermaker without regard to whether he held a Building Trades quarterly card or whether he was a union member (R. 158-159, 162, 164, 258-260). Hagan's testimony in this regard is confirmed by the testimony of various witnesses who were hired by Hagan even though they did not have Building Trades quarterly cards at the time they were hired and by exhibits listing the non-members of District 2 employed as boilermakers on the Astoria project of Babcock & Wilcox Company (R. 54-60, 211-212, 226-227, 241).

While there was no evidence that any non-union man had been employed on the Astoria project of the Babcock & Wilcox Company, Hagan attributed this situation to the fact that as far as he was aware no nonunion man had applied there for a job as a boilermaker (R. 163). That no non-union man had so applied Hagan attributed to the high state of organization of boilermakers in New York (R. 163). He testified he did not know of any non-union boilermakers in the area (R. 163). There was no evidence to establish that there were in fact any such. Hagan further testified without contradiction that he had never turned a man down for employment because he was not a union member (R. 163).

When there were no men at the gates of the plant looking for jobs as boilermakers, if Hagan needed additional boilermakers he called the day hall of District 2 where unemployed boilermakers congregated (R. 156-157, 159). The evidence showed that there was no other source of supply of boilermakers in the area except offices of the International Brotherhood (R. 232). There was no limitation, either as to membership in a local affiliated with District 2 or otherwise as to the boilermakers who might and did congregate at the day hall of District 2 and listen to the announcements there made of openings for boilermakers (R. 231, 207, 95-97).

In view of the foregoing evidence the terms of the union security provisions and the "savings clause" in the contract between District 2 and Babcock & Wilcox Company must obviously be read together. The savings clause read as follows (R. 15-16):

> "Any provisions of this Agreement which provide for Union Security or employment in a manner and to an extent prohibited by any law or determination of any governmental board or agency, shall be and here-

by is of no force and effect during the terms of said prohibition. It it understood and agreed, however, that if any of the provisions which are hereby declared to be of no force and effect because of restrictions imposed by law, are determined either by Act of Congress or other legislative enactment or by a decision of the court of highest recourse to be legal or permissible, then any such provisions shall immediately become or remain effective during the remainder of the term of this Agreement."

The provisions of the agreement which provide for union security so far as here relevant are as follows (R. 14-15):

"1. The Employer shall employ none but building construction members in good standing in the Union on all work done by or for him on all construction, repair and maintenance work * * * coming within the jurisdiction of District No. 2, as set forth in the Constitution of the International Brotherhood of Boilermakers * * *, the Building Trades Department of the American Federation of Labor, and agreements of record as to work jurisdiction entered into between the International and other Internationals and Local Unions affiliated with the A. F. of L. The Employer further agrees that he will demand and see the working cards and Building Trades quarterly cards of Employees before employing them.

"2. The Union shall furnish the Employer, to the best of its ability and within a reasonable time, with such competent mechanics and helpers as the Employer may reasonably require on the terms and conditions contained in this Agreement.

"The Employer shall be at liberty to employ and discharge whomsoever they see fit, and the members of the Union shall be at liberty to work for whosoever they see fit, but only under the terms of this Agreement.

"The members of the Union shall not refuse to work with mechanics and helpers who are not mem-

bers of the Union when the Union has failed to supply a sufficient number of mechanics and helpers."

The parties to the above contract all have agreed that the requirement of good standing in the Union as a condition of employment is illegal and hence has at all times been inoperative in accordance with the terms of the savings clause (R. 185, 242-243, 261, 262). The Union does contend that insofar as the contract provides for preference of members of the Union with building construction experience over members without such experience it is legal and that the system used by the Boilermakers of classifying members into locals on the basis of the industry in which they are employed is a proper means of achieving preference for members experienced in the employing industry.

The General Counsel of the National Labor Relations Board upon charges filed by the above mentioned four members of Local 23, issued his complaint against District 2 and Babcock & Wilcox Company alleging that by maintaining in effect the above quoted union security agreement and by denying the four charging parties employment at the Astoria projects of the Babcock & Wilcox Company, District 2 had committed unfair labor practices in violation of Section 8(b)(1)(A) and (2), and the Babcock & Wilcox Company had committed unfair labor practices in violation of Section 8(a)(1) and (3), of the National Labor Relations Act, as amended (R. 7-13).

After the usual proceedings, the National Labor Relations Board, on December 27, 1954, issued its decision and order (R. 336-343) finding that by maintaining and enforcing the above quoted union security clause District 2 had made membership in the International Brotherhood of Boilermakers a condition of employment at the Astoria

project (R. 291-292) and established preferential employment for members of District 2 over other members (R. 292-293). The Board held that the fact that only union members were employed at Astoria showed that the savings clause had not operated to postpone the operation of the union security clause until it became legal (R. 283-285, 292-295). The Board further found that District 2 had caused the Babcock & Wilcox Company to deny employment to the four charging parties because they were members of Local 23 and not of District 2 (R. 285-295). The Board concluded that District 2 had thereby caused the Babcock & Wilcox Company by discrimination with respect to hire to encourage membership in a labor organization in violation of Section 8(b)(1)(A) and (2) of the Act (R. 295).

The Board ordered District 2 to cease giving effect to the union security provisions in its contracts with the Babcock & Wilcox Company and with all other employers, to cease causing the Babcock & Wilcox Company or any other employer to discriminate against employees, to notify the charging parties and the Babcock & Wilcox Company that it has no objection to their employment or the employment of other members of Local 23 or of other unions or of no union, to make whole the four charging parties for pay lost by the discrimination against them and to post appropriate notices (R. 341-343).

Upon petition for enforcement of its order, filed by the National Labor Relations Board, the United States Court of Appeals for the Second Circuit, on April 25, 1956, handed down its opinion granting enforcement. The opinion is printed in Appendix A hereto, pp. 19-23, *infra*. On June 6, 1956, the Court of Appeals denied the petition for rehearing filed by District 2, and entered its decree enforcing the Board's order (R. .....).

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is directly in conflict with the decisions of the Court of Appeals for the Eighth Circuit in *N.L.R.B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 841 (decided May 6, 1952), and *N.L.R.B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 702 (decided May 8, 1952). Hereinafter we shall refer to the decision of May 6, 1952 (196 F. 2d 841) as the first *Del E. Webb* case and the decision of May 8, 1952 (196 F. 2d 702) as the second *Del E. Webb* case, although it is to be noted the second case in point of time of decision by the court was reported at an earlier page in 196 F. 2d than the other *Del E. Webb* case. The court below held that the decision in the second *Del E. Webb* case (196 F. 2d 702) had been overruled by this Court in *Radio Officers Union* v. *N.L.R.B.*, 347 U. S. 17, 22-23, notes 2 and 3. The court below made no reference to the decision in the first *Del E. Webb* case (196 F. 2d 841). In holding that the *Radio Officers* case had overruled the second *Del E. Webb* case (196 F. 2d 702) the court below failed to appreciate the very basic differences between the problem involved in the *Radio Officers* case on the one hand and that presented by the *Del E. Webb* and the instant cases on the other hand.

The problem in the instant case is whether a union may classify its members on the basis of the industry in which they are employed and establish preferential hiring not on the basis of membership or nonmembership in the union but on the basis of the industry in which applicants had been previously employed as evidenced by their classification by the union. In the second *Del E. Webb* case the problem was similarly one of the right of a union to have its members with more than five years' experience who had demonstrated their ability to handle cer-

tain machinery and whom the union classified as journeymen, given preferential employment as against its members with less than five years' experience and who had not demonstrated their experience to handle the machines, whom the union classified as apprentices. In neither the instant case nor the second *Del E. Webb* case was the union causing any discrimination which had as its object, or which could have as its effect, influencing employees in the exercise of their organizational rights. The discrimination had as its object the employment of experienced as against inexperienced workmen. Its only effect would be to encourage the acquisition of better qualification for a job or establishing that qualification by appropriate means.

In the *Radio Officers* case on the other hand the discrimination was between members in good standing in the union and persons not members in good standing. In the *Teamsters* case, decided together with the *Radio Officers* case, the victim of the discrimination was a member of the union who lost his seniority status by failure to pay dues in the union and in the *Radio Officers* case the victim of the discrimination had been a member but was expelled for failure to observe union rules. Thus both the object and the effect of the discrimination in those cases was to encourage membership in good standing in the union. In the *Gaynor* case, also decided with the *Radio Officers* case, the wage increase went only to union members and therefore the effect of the discrimination between union and nonunion members was certainly to encourage membership in the union.

In the second *Del E. Webb* case, the Court of Appeals for the Eighth Circuit held that the union did not commit an unfair labor practice by causing an employer to displace an apprentice member of the union in favor of a journeyman member of the union. There, as here, the

union maintained its classification based on experience and ability by assigning members to different locals. There apprentices were members of Local 101-B and journeymen were members of Local 101 just as here members employed in the boiler rooms of a navy yard were members of Local 23 whereas members employed in the building construction industry were members of District 2. In the *Del E. Webb* case the court said (196 F. 2d 702, 706):

> "it is not * * * material whether Local 101 and Local 101-B are the same or different unions. Members of respondent union are skilled craftsmen. There is provision for an orderly promotion from the apprentice stage to the journeyman status, after which a member may properly be regarded as a master craftsman. Nothing in the National Labor Relations Act prevented a union from adopting rules of its own as to distribution of work among its members."

From the foregoing we submit it is evident that the instant case presents a square conflict with the second *Del E. Webb* case (196 F. 2d 702).

The first *Del E. Webb* (196 F. 2d 841) case presents a conflict with respect to the right of the Board to infer from the fact that only union members are employed that either the union or the employer were engaging in illegal union security practices. There as here the evidence established that no nonunion man had applied for a job and that the craft was virtually 100 per cent organized in the community. The court of appeals held that in such circumstances the Board could not properly infer any discrimination in favor of union members and set aside the Board's order. The court below on virtually the same facts upheld the Board's inference that District 2 insisted upon membership in the International Brotherhood as a

condition of employment. From the language in the opinion of the Eighth Circuit it seems obvious it would have set aside the Board's determination in this case. Thus the Eighth Circuit stated (196 F. 2d 841, 846):

> "The Board found further evidence that an illegal agreement had been entered into from the fact that all of the 80 to 100 common laborers hired by Webb during the period in question were members of the Union. The probative value of that fact is small. There was undisputed evidence that in the Kansas City area 98% of all common laborers in construction work were members of the Union. It is extremely likely that all the laborers on any large project in that vicinity would be union men. Added to that is the undisputed fact that in the record there is no single instance of a non-union man applying for a job, either at the site of the project or at the union hall."

2. The questions presented are each important in the administration of the National Labor Relations Act. It is obviously harmful to the public, employers and employees alike to limit a union in its reasonable efforts to assure safety through employment of those most skilled on such hazardous jobs as welding on the scaffolding of huge, new buildings. It seems most unreasonable to construe the National Labor Relations Act as preventing a union from classifying its members on the basis of the industry in which they are employed and causing employers to prefer its members classified in the appropriate industry over members not so classified. Neither the literal language of the statute nor the accepted object of that language justify such a construction.

Nor should the fact that a skilled craft is so highly organized in a large metropolitan area that no non-members are known to exist, subject a union to the odium of being branded as a violator of the law just because no one but

its members is employed on a project at which no one else ever applied for a job.

Likewise, the many sound reasons in favor of stabilizing industrial relations for a period of years by long term collective bargaining agreements requires that the parties be free to specify the terms to be in effect if the law should change. In the summer of 1950, when the contract here involved was signed, there were pending in Congrss measures to repeal or amend the union security provisions of the Taft-Hartley Act.[2] A union, hopeful of an early repeal, would hardly want to bind itself to fixed terms of employment for three years without saving its right to a closed or a preferential shop for so much of those three years as should remain after the hoped-for repeal. What better solution could be devised than to write such a provision into the agreement and expressly make it inoperative unless and until the law changed to make it legal? Yet the court below, without even discussing the matter, upheld the Board's order which condemns this practice. The decision below, unless reversed by this Court, will act as a substantial deterrent to collective bargaining agreements of any substantial term of duration.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLIF. LANGSDALE,
922 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

August 24, 1956

[2]S. 69, 249; H.R. 211, 231, 237, 259, 482, 891, 985, 1143, 1184, 1219, 1318, 1513, 1715, 1747, 2032, 4596, 4811, 4914, 7696, all in the Eighty-First Congress. For debates during this Congress on amendments to legalize the closed shop see 95 Cong. Rec. 7227, 7239, 7244-7245, 7418-7420, 7495-7497, 7593, 7624-7626, 7641-7642, 8703, 8713.

Exhibit A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235—October Term, 1955.
(Argued March 15, 1956 Decided April 25, 1956.)
Docket No. 23830

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A.F.L., DISTRICT No. 2,

Respondent.

Before:

FRANK, LUMBARD and WATERMAN,

Circuit Judges.

Petition by the National Labor Relations Board for an enforcement of its order. Enforcement granted.

THEOPHIL C. KAMMHOLZ, General Counsel,
DAVID P. FINDLING, Associate General Counsel,
MARCEL MALLET-PREVOST, Assistant General Counsel,
SAMUEL M. SINGER,
MELVIN POLLACK,
Attorneys, National Labor Relations Board.

CLIF. LANGSDALE (Kansas City, Missouri,) *Attorney for International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, District No. 2, Respondent.*
FRANKLE & RUFFO, *Attorneys for Stephen Mrazek, Walter Smith, Michael Duncovich and Joseph Marin, the Charging Parties.*
On the Brief: Philip J. Ruffo, Max H. Frankle.

FRANK, *Circuit Judge:*

The facts are fully stated in the Board's Decision and Order, reported 110 N. L. R. B. 2116. The findings are amply supported by the record as a whole. The respondent company has agreed to comply with the portion of the order directed against it. The Trial Examiner's Intermediate Report and the Board's Decision completely demolish all the respondent union's contentions. We mention but two:

(1) The parties to the collective bargaining agreement are the employer-company and the respondent union, District No. 2. That union is a "subordinate" of an International union; but the International is not a party to the bargaining agreement. The agreement contains provisions which violate the statute, i.e., they prescribe that the employer "shall employ none but building construction members in good standing on all work * * * coming within the jurisdiction of District No. 2. * * *" Such an unlawful discriminating agreement is not the less so because it applies, as it did here, to members of other local unions which are also "subordinates" of the International. The actual conduct of the respondent union and the employer conformed to the discriminatory provisions and was therefore also violative of the statute. That these provisions and that conduct were authorized or required by the parent union, the International, cannot render them lawful: The

"child's" sins are not to be excused because committed in obedience to the commands of the parent; such paternal commands do not nullify those issued by Congress.[1]

(2) The Board found that all the respondent union's agreements contain unlawful provisions substantially the same as those before us here; accordingly the Board's Order, which prohibits like conduct anywhere, is not invalidly broad.[2]

Enforcement granted.

LUMBARD, *Circuit Judge* (concurring):

The company and the union, District 2 of the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, entered into a contract dated July 1, 1950, to run for three years, the pertinent provisions of which are found in paragraph 1, reading:

> "1. The Employer shall employ none but building construction members in good standing in the Union on all work done by or for him on all construction, repair and maintenance work within the Metropolitan area
>
> * * * The Employer further agrees that he will demand and see the working cards and Building Trades Quarterly cards of Employees before employing them."

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1 See, e.g., *N. L. R. B.* v. *Philadelphia Iron Works, Inc.*, 211 F. 2d 937, 940-944 (C. A. 3); *Communication Workers* v. *N. L. R. B.*, 215 F. 2d 835, 838 (C. A. 2); *N. L. R. B.* v. *George D. Auchter Co.*, 209 F. 2d 273, 276-277 (C. A. 5).

The respondent union cites *N. L. R. B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 702 (C. A. 8), in which the Eighth Circuit relied (pp. 705-706) on *N. L. R. B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3). But, so far as they have pertinence here, those decisions were over-ruled in *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 22-23, Notes 2 and 3. *N. L. R. B.* v. *Turner Construction Co.*, 227 F. 2d 498 (C. A. 6) turned on its peculiar facts.

2. See, e.g., *Bausch & Lomb Optical Company* v. *N. L. R. B.*, 217 F. 2d 575, 578 (C. A. 2); *N. L. R. B.* v. *Lummus Co.*, 210 F. 2d 377, 381 (C. A. 5).

The Board confirmed the finding of the Trial Examiner that four members of Lodge 23 of the Boilermakers Union were refused employment because they were not members of District 2. These acts and the provisions of the contract were obvious and flagrant violations of §8(a)(3) of the National Labor Relations Act which makes it an unfair labor practice for an employer to discriminate in regard to hire to encourage membership in a labor organization.

The four charging parties are members of Lodge 23 of the Boilermakers International which limits Lodge 23's work jurisdiction to the Brooklyn Navy Yard. Mrazek unsuccessfully applied at the company's Astoria job several time in December 1952 and on January 5, 1953. Hagan, the company's foreman, told Mrazek that although he needed men he could not put him on without District 2's permission, and this was confirmed by the tenor of Mrazek's talk with District 2's field representative, Graber, in January.

Smith, Duncovich and Marin were each refused employment by Hagan on January 8th. Hagan told Smith and Marin that since they were Lodge 23 members and did not have Building Trades Quarterly cards they would have to get the approval of District 2 headquarters. At 14th Street headquarters field representative Graber told them that the Astoria jobs were being held for District 2 members.

On the same day, January 8th, Duncovich received substantially similar advice from Hagan at the Astoria project and from Graber and another field representative at two different District 2 headquarters. There was ample evidence to sustain the finding of the Board and its Trial Examiner that pursuant to its unlawful hiring arrangement the company had discriminatorily refused employment to

the four complainants and that District 2 had caused this discrimination.

Thus it follows that by the performance of this discriminatory contract with the company and by causing the company to discriminate against the charging parties, District 2 violated §§8(b)(2) and (1)(A) of the National Labor Relations Act.

The evidence justified the Board's rejection of District 2's contention that the Board could not issue its complaint because the four complainants were merely fronting for Lodge 23 in a jurisdictional dispute with District 2. Mrazek and Marin were unemployed at the time, and Smith although working elsewhere was receiving $1.20 an hour less than the boilermaker wage scale in effect at the Astoria project. Duncovich also was working elsewhere, but his weekly salary was nearly $50 less than the pay scale on the Astoria job.

Of course, no provision of the constitution or rules of the International which chartered both District 2 and Lodge 23 could validly determine where and under what circumstances the members of a particular local could apply for and be given jobs by an employer. The Act is paramount and its provisions may not be whittled away or circumvented by any action of the International any more than by the agreement between the company and District 2 which we here strike down.

For the reasons stated above and in Judge Frank's opinion I concur in granting enforcement of the Board's order.

WATERMAN, *Circuit Judge:*

I concur with my colleagues in each of the foregoing opinions.

Exhibit B.

110 NLRB No. 264 D-8791
New York, N. Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

The Babcock & Wilcox Company
and Case No. 2-CA-2921
Stephen Mrazek, Walter Smith, Michael Duncovich and Joseph Marin, Individuals.
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, District No. 2
and Case No. 2-CB-948
Stephen Mrazek, Walter Smith, Michael Duncovich and Joseph Marin, Individuals.

DECISION AND ORDER.

On May 13, 1954, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent Employer and the Respondent Union had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, each Respondent filed exceptions to the

Intermediate Report and supporting briefs, and the charging parties filed a brief in support of the Intermediate Report.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2]. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the following additions.

1. The Respondents assert that the Trial Examiner erroneously ruled that the individual charging parties were not "fronting" for Local 23, a noncomplying union. We agree with the Trial Examiner that the charges were filed by the 4 individuals on their own behalf, and that any benefits that their union might derive from a resolution of the charges is at most incidental to the rights of the individuals involved.[3] Like the Trial Examiner, we also find without substance the related contention of the Respondents that the 4 individuals did not make *bona fide* applications for employment. One of them, Mrazek, had been laid off and was therefore unemployed when he first applied for a job at the Babcock & Wilcox Project. Marin, another applicant, was also unemployed when he applied.

---

[1]The Respondent Employer's request for oral argument is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2]The Respondent Employer has excepted to the Trial Examiner's ruling permitting the General Counsel to amend the complaint at the hearing to allege a discriminatory refusal to hire Mrazek on December 4, 1952, asserting that the amendment was more than 6 months after December 4, and therefore barred by Section 10 (b). As the original charge filed January 19, 1953, alleged a discriminatory refusal to hire Mrazek in January 1953, we find that the amendment was proper. See *Sawyer Downtown Motors, Inc.*, 103 NLRB 1735; *Dinion Coil Co., Inc.* v. *N.L.R.B.*, 210 F. 2d 484 (C. A. 2).

[3]*N.L.R.B.* v. *Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730 (C. A. 9), cert. denied, 346 U. S. 937; *N.L.R.B.* v. *Coal Creek Coal Co.*, 204 F. 2d 579 (C. A. 10).

Smith and Duncovich were working at an hourly pay rate of $2.10, as against $3.30 available at Babcock & Wilcox' project. There is nothing in the record that could reasonably indicate that any of the 4 would not have accepted proffered employment. The evidence suggests that at least 3 of the 4 may have suspected they would not be employed, but that fact, if proved, would not affect the validity of the applications.

2. The Respondents assert that the complaint should be dismissed even assuming that the Trial Examiner's conclusion that the 4 applications for employment were legitimate is correct, because the purpose of the charges was to further the cause of Lodge 23 in its jurisdictional conflict with the Respondent Union. The Respondent's reliance on *Vaughn Bowen*, 93 NLRB 1147, is misplaced. Most cases of this type involve conflicts of jurisdiction between 2 labor organizations, sometimes between separate internationals, sometimes between locals or districts of a single international. Only when, as in *Vaughn Bowen* itself, there is a token hiring and firing, or when an applicant for employment would not take the job he purportedly seeks were it offered, is there an abuse of the Board's machinery. Accordingly, we find that this contention lacks merit.

3. As to the alleged substantive violations, for the reasons set forth in his Intermediate Report, we agree with the conclusions of the Trial Examiner, except that we do not rely upon the noncompliance of District 2 and some of its constituent lodges in finding unlawful any of the provisions of the contract between the Respondent Employer and the Respondent Union.[4]

[4]This issue was not raised in this posture at the hearing. In any event, we agree with the Trial Examiner that the contract's provisions themselves violate the statute.

The Remedy.

In conformity with the Board's recent decision in *Local Union 595, International Assoc. of Bridge, etc. Workers, AFL*, 109 NLRB No. 12, we shall require the Respondent Union to notify each discriminatee, as well as the Respondent Employer, that the Respondent Union has no objection to his immediate employment.

The Respondent Employer has moved to reopen the record to include an affidavit to the effect that the project at Astoria where Mrazek, Duncovich, Smith and Marin were refused employment has been completed. This material is matter to be dealt with in connection with compliance. The Board does not require the Respondent Employer to do a useless thing, and that portion of our order that requires the Respondent Employer to offer employment to the charging parties is necessarily conditional upon the Employer continuing to do business and to employ boilermaker employees in the jurisdictional area of the Respondent Union.[5] The Employer's motion is accordingly denied. As the contract between the Employer and the Union, portions of which are unlawful, is not limited in scope to the Astoria project, but applies throughout District 2's jurisdiction, we conclude that, to be coextensive with the violations of the Act found, our order should embrace the operations of each Respondent throughout this area. We shall therefore modify the Trial Examiner's recommended order and limit its scope to the jurisdictional area of District 2 as set forth in the contract between the Respondents.

[5] See *Joseph E. Cote d/b/a J. E. Cote, et al.*, 101 N.L.R.B. 1486, 1488. In the event that the project at Astoria has actually been completed, the Respondent Employer will be required to offer employment to the charging parties at any of its projects within this jurisdictional area of the Respondent Union where it employs boilermakers.

ORDER.

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

I. The Respondent Babcock & Wilcox Company, New York, New York, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to, in connection with any of its construction projects or operations within the territorial jurisdiction of the Respondent Union, any employment arrangement or agreement or practice with District No. 2, or with any other subdivision of subordinate lodge of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, or with the International Brotherhood, requiring membership in or referral or clearance by any labor organization except in a manner permitted by Section 8 (a) (3) of the Act;

(2) In any like or related manner encouraging membership in District No. 2 or in any other subdivision or lodge of the aforesaid International Brotherhood, or in the International Brotherhood, or in any other labor organization, or discouraging membership in Boilermaker Lodge 23 or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer employment to the four charging parties in the manner described herein in the section entitled "The Remedy";

(2) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay dues in accordance with this Order;

(3) Post at all of its construction projects or operations within the territorial jurisdiction of the Respondent Union copies of the notice attached hereto as Appendix A.[6] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an official representative of the Respondent Employer, be posted by it immediately after receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to insure that such notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

II. The Respondent District 2, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, New York, New York, and its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to, any employment arrangement or agreement or practice with The Babcock & Wilcox Company, or with any other employer within the meaning of the Act, requiring membership in or referral or clearance by any labor organiza-

[6] In the event this Order is enforced by a Decree of the United States Court of Appeals, there shall be inserted before the words "A DECREE AND ORDER" the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

tion, except in a manner permitted by Section 8 (a) (3) of the Act;

(2) Causing or attempting to cause The Babcock & Wilcox Company, or any other employer, to discriminate against employees within the meaning of the Act;

(3) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act;

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Notify the four charging parties and The Babcock & Wilcox Company, in writing, that it has no objection to their employment, or to the employment of any other boilermaker employees who are not members of District 2 or of any other labor organization, or who are members of Lodge 23 or of any other organization;

(2) Post in conspicuous places in its business offices, and in all places where notices to members are customarily posted, copies of the notice attached hereto as Appendix B.[7] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative, be posted by it immediately after receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(3) Mail signed copies of the notice attached hereto as Appendix B to the Regional Director for the Second Region, for posting, by The Babcock & Wilcox Company at all of its construction projects or operations within the territorial jurisdiction of the Respondent Union. Copies

[7] See footnote 6, *supra*.

of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by an authorized representative of the Respondent Union, be forthwith returned to said Regional Director for such posting.

III. The Respondent Employer and the Respondent Union their officers, agents, representatives, successors, and assigns, in addition to the respective action above ordered, shall jointly and severally, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," make whole Stephen Mrazek, Walter Smith, Michael Duncovich, and Joseph Marin.

Dated, Washington, D. C.

Guy Farmer,	Chairman
Abe Murdock,	Member
Ivar H. Peterson,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our emloyees that:

WE WILL NOT require employees or applicants for employment to be members of, or to obtain clearance or job referrals from, DISTRICT 2, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,

AFL, or from any other labor organization, as a condition of employment, except in conformity with Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or otherwise give effect to any hiring agreement or arrangement or practice with DISTRICT 2 or with any other labor organization except as authorized by Section 8 (a) (3) of the Act.

WE WILL NOT encourage or discourage membership in any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL reinstate and make whole the following individuals for the discrimination against them:

Stephen Mrazek
Walter Smith
Michael Duncovich
Joseph Marin

All our employees are free to become, remain, or to refrain from becoming or remaining, members of the above-name dunions, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee or applicant for employment because of mem-

bership in or nonmembership in any such labor organization.

THE BABCOCK & WILCOX COMPANY
(Employer)

By .....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

TO ALL MEMBERS OF DISTRICT NO. 2, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, AFL

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause THE BABCOCK & WILCOX COMPANY, or any other employer, to require employees or applicants for employment to be members of the Boilermakers or of any other union or to obtain clearance or job referrals from us, except as permitted by Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or otherwise give effect to any hiring agreement or arrangement or practice with THE BABCOCK & WILCOX COMPANY, or with any other employer, except as authorized under Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause THE BABCOCK & WILCOX COMPANY or any other employer, to discriminate in any manner against employees or applicants for employment in violation of Section 8 (a) (3).

WE WILL NOT in any like or related manner restrain or coerce employees or prospective employees of THE BABCOCK & WILCOX COMPANY, or of any other employer, in the exercise of rights under Section 7 of the Act.

WE WILL withdraw objections to the employment of members of Lodge 23 and make whole the following such members for the discrimination caused against them:

Stephen Mrazek
Walter Smith
Michael Duncovich
Joseph Marin

DISTRICT NO. 2, INTERNATIONAL
BROTHERHOOD OF BOILERMAKERS, AFL
(Labor Organization)

Dated..... By.....
(Title of Officer)

Dated..... .....
(Business Agent)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR

RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

The Babcock & Wilcox Company
and
Stephen Mrazek, Walter Smith, Michael Duncovich and Joseph Marin, Individuals.

Case No. 2-CA-2921

International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, District No. 2,
and
Stephen Mrazek, Walter Smith, Michael Duncovich and Joseph Marin, Individuals.

Case No. 2-CB-948

Harold Richman, Esq., for the General Counsel.
Frankle & Ruffo, of New York City, by *Philip J. Ruffo, Esq.*, and *Max H. Frankle, Esq.*, for the Charging Parties.
Sullivan & Cromwell, of New York City, by *William A. Ziegler, Jr., Esq.*, for the Respondent Company.
Clif Langsdale, Esq., of Kansas City, Mo., *Joseph Cohn, Esq.*, of New York City, and *Sidney Hauptman, Esq.*, of New York City, for Respondent District 2.

Trial Examiner: *Ralph Winkler.*

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon charges filed by the four individuals named in the caption above, the General Counsel for the National Labor Relations Board issued a consolidated complaint on May 14, 1953, against Respondent Company (The Babcock & Wilcox Company) and Respondent District No. 2 (a labor organization affiliated with International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL) alleging violations of Section 8 (a) (1) and (3) of the Act as to the Respondent Company and of Section 8 (b) (1) (A) and 8 (b) (2) as to Respondent District 2. Copies of the complaint and charges were served upon the Respondents; the Respondents, in turn, filed answers denying the commission of the unfair labor practices alleged.

Pursuant to notice, a hearing was held in New York City in December, 1953, and January, 1954, before the undersigned Trial Examiner. All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The parties were afforded opportunity to present oral argument before the Trial Examiner and to submit briefs and proposed findings of fact and conclusions of law. All parties submitted very competent briefs which have been most helpful to the undersigned. Motions of the Respondents to dismiss the complaints are disposed of in accordance with the following findings of fact and conclusions of law.

Upon the record,[1] and upon observation of the demeanor of witnesses, I make the following:

Findings of Fact

I. The business of the Company.

Respondent Company, a New Jersey corporation with principal offices in New York, New York, is engaged in several States in the manufacture, sale, and installation of steam boilers and related products. The present case arises in Astoria, Long Island, New York, where the Company is erecting steam boilers for Consolidated Edison Company of New York. In 1952, the Company's interstate purchase of material and equipment for this project exceeded $900,000.

The Company, I find, is engaged in commerce within the meaning of the Act.

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[1] The transcript is hereby corrected in accordance with the parties' stipulation, which stipulation is also hereby included in the record.
The testimony of Arthur P. Smith was stricken at the hearing upon the General Counsel's motion. That ruling is hereby reconsidered and reversed.

II. The unfair labor practices.

The complaints allege that Respondent Company and Respondent District 2 have maintained and performed an agreement which unlawfully requires membership in District 2 as a condition of employment and/or which unlawfully gives employment preference on the basis of such membership. The complaints further allege that the four charging individuals—Stephen Mrazek, Walter Smith, Michael Duncovich, and Joseph Marin—were discriminatorily denied employment at the Company's Astoria project because of these allegedly unlawful requirements respecting membership in District 2. These four individuals were not members of, or otherwise directly affiliated with, District 2; they were, rather, members of Lodge No. 23, another subordinate lodge of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, herein called the International.[2] It will be helpful at the outset to consider the organizational and economic situation affecting District 2 and Lodge 23.

The subordinate Lodge, such as Lodge 23, is the International's basic unit of organization. Its charter from the international allocates to it specific "jurisdiction" both with respect to territory and nature of work. (For example, there are so-called Railroad Lodges, Contract Shop Lodges, Contract Shop & Construction Lodges, Shipyard Lodges, and Navy Yard Lodges.) A subordinate lodge member is normally required, after taking up work outside the "jurisdiction" of his lodge, to take out a clearance card from his lodge and deposit it in the lodge having "jurisdiction" over his new class of work, thus becoming a member of the lodge in which he deposits the card.[3] The International Constitution provides sanctions for a mem-

[2]The International has amalgamated with the Blacksmiths Union.

ber's failure to observe these requirements. When a man becomes a member of a particular subordinate lodge, he is expected, according to International Vice President W. G. Pendergast, "to confine his activities as a boilermaker to the jurisdiction assigned to [that] particular subordinate lodge." The "jurisdiction" of Lodge 23, of which the four aforementioned job applicants were members, is limited to the Boiler Shop of the Brooklyn Navy Yard, and it has no assigned "jurisdiction" over building trades construction work which is also commonly called field work. Lodge 23 has approximately 120 members.

Respondent District 2 is a district lodge of the International. A district lodge is composed of several subordinate lodges, all having the same trade "jurisdiction," and in turn is allocated specified territorial and trade "jurisdiction" by the International. District 2 is composed of five subordinate lodges[4] with an aggregate membership of approximately 620, and has "jurisdiction" over building construction work in the State of Connecticut and in the New York Metropolitan area including the City of New York, all of Long Island and the Counties of Westchester, Putnam, Dutchess, Rockland, Orange, Sullivan and Ulster.

District 2 and its constituent subordinate lodges are affiliated with the Building Trades Council of New York, which is in turn affiliated with the Building and Construction Trades Department, AFL. The Building and Construction Trades Department forwards Building Trades Quarterly Cards to the Trades Council which in turn issues them to its component organizations, including District 2, for distribution to their membership; each member of the subordinate lodges comprising District 2 was entitled to such

[3]The rule respecting the deposit of clearance cards (see Art. I, Sec. 2, and Art. X, Sec. 4, Subordinate Lodge Constitution—General Counsel Exhibit 3, pp. 60, 86), does not apply "where working agreements exist between Subordinate Lodges" (G. C. Exh. 3, p. 86).

[4]Lodges 21, 24, 45, 200, and 245.

card. Lodge 23 was not affiliated with District 2—the boilermaker unit of the New York Building Trades Council—and its members were not entitled to such cards.[5]

On May 2, 1950, Lodge 23 made application to District 2 for admission to the latter. Meetings between District 2 and Lodge 23 were held, and Lodge 23's request was denied. Lodge 23 then submitted the matter to Charles J. MacGowan, the International's president, and MacGowan sent the following letter to Lodge 23 on May 28, 1951:

> . . . I examined our records and made some investigation of the whole situation surrounding District #2 and I find the following:
>
> 1. Lodge #23 was chartered and has operated since it was chartered as a Navy Yard lodge.
>
> 2. District #2 was chartered and has operated strictly in the building and construction industry. It has no jurisdiction in the Navy Yards or the shipyards.
>
> It is therefore my opinion that District #2 could not accept your Lodge, or any other Navy Yard Lodge or shipyard Lodge into affiliation in that District, unless and until the International Executive Council enlarged its jurisdiction upon proper presentation by all interested parties.
>
> Therefore, it is my ruling that Lodge #23 is not eligible to affiliate with District #2 and District #2 could not accept your affiliation even if they were so minded, any more than you could affiliate say with District #12 on the New York Central Railroad.

Subsequent to MacGowan's letter, International Vice President Pendergast discussed the matter with representatives

[5]Although Vice President Pendergast claimed that some members of Lodge 23 did receive these cards, the record does not support such assertion.

of District 2 and Lodge 23, and on July 6, 1951, Pendergast sent the following letter to International President MacGowan, with copies to District 2 and Lodge 23:

> In compliance with your instructions the above conference was arranged and held at the New York office on Tuesday, July 354, 1951, at 11 am. Present at the conference were Brothers Cook, Gallo, and Bucco, representing Lodge #23, and Brother Boylan, assistant to the Business Manager of District #2, representing District #2.
>
> It was explained that the jurisdiction of all District and Local Lodges were allocated by the International Executive Council and that the jurisdiction of District #2 embraced all field and construction work in the territory allocated by the Executive Council at the time District #2 was organized, and amended from time to time. The representatives of Lodge #23 were advised that any change in the jurisdiction would have to be taken up with the International President and the Executive Council.
>
> *However, it was understood by all present that the practice now in effect would not be changed; to wit: The members of the Lodges #21, 24, 45, 200 and 245 would get preference on employment on all field and construction work under the jurisdiction of District #2, and would be entitled to Building Trades Quarterly working cards. The members of all other local unions of the International Brotherhood, within the territory under the jurisdiction of District #2, which local unions are not affiliated with District #2, should be employed on field and construction work before any new members are initiated or clearance cards accepted in any local union affiliated with District #2. These members would not be entitled to receive Building Trades Quarterly working cards, but would be entitled to employment before members of the International Brotherhood from out of the State were employed on*

> *any job under the jurisdiction of District #2.* (Emphasis added.)

Lodge 23 President Thomas Cook and Financial Secretary Nicholas Gallo went to Kansas City, Kansas, in April, 1952, to take up with the International Executive Council at International Headquarters the matter of Lodge 23's affiliation with District 2. Harry Nacey (who is the chairman or head of District 2, and the business manager of District 2 and of its five subordinate lodges) represented District 2 in opposing Lodge 23's request before the Executive Council.[6] By letter dated May 7, 1952, MacGowan advised Lodge 23 and District 2 that the Executive Council had sustained MacGowan's decision on the matter as contained in MacGowan's letter of May 28, 1951, set forth above.

Lodge 23 protested the Executive Council's decision and added in a letter of May 29, 1952, to MacGowan that "if the International cannot assist us in any way then Local #23 must take further procedure." Not hearing otherwise from the International, Lodge 23 advised MacGowan on November 9, 1952, that "circumstances compel us to retain Legal Counsel. Conditions (work) have deteriorated to such a phase that it leaves us with no alternative." This same communication also advised MacGowan that Lodge 23's next step was "the Law of the Land." On December 4, 1952, MacGowan directed all members of Lodge 23, as follows:

> For a considerable time past, there has been a continuous exchange of correspondence between the officers

[6]On this occasion, according to Gallo's credible testimony which Nacey denies, Nacey offered employment to Gallo at the Astoria project if Gallo would "forget this thing." And, according to Cook's credible testimony which Nacey also denies, Nacey told Cook on this same occasion that if they would dispose of the matter of Lodge 23's affiliation, Cook himself would have no concern about his own employment, that Cook "could call up [Nacey] and get a job anytime [Cook] wanted."

of Lodge #23 and the International Headquarters with respect to the claims of Lodge #23 for outside shop and field jurisdiction.

On several occasions, the matter has been acted upon by the International Executive Council and so that you may be familiar with the duties of the Council, you are directed to Section 3 of Article III, International Lodge Constitution, pages 10 and 11, reading as follows:

> "The Executive Council shall be empowered to *charter* District, State, *Subordinate* and Auxiliary Lodges . . ."

Then in Section 5 of the same Article on page 11, captioned "Adjustment of Grievances," you will find the following:

> "The executive Council, in conformity with the Constitution and By-Laws, and with the Convention declaration of policy as its guide, shall hear and determine all grievances referred to it, and shall recommend remedies or adjust the same as the gravity of the case may require."

Thus the Constitution grants to the Executive Council, first, the duty to charter a subordinate Lodge and define its jurisdiction when issuing the charter. Second, if any disputes, including the question of territorial jurisdiction, shall be referred to the Executive Council, then the Council will handle the matter and render a decision.

Therefore, at the meeting of the Executive Council on November 13, 1952, the following motion was unanimously adopted:

> "That the International President notify all of the members engaged in field construction work, now members of Lodge #23, or who are not employed in the Navy Yard, that it is the decision

> of the Executive Council that Lodge #23 is a Navy Yard Local and all members not employed at the Brooklyn Navy Yard should transfer their membership to the Local Union having jurisdiction over their work."
>
> The foregoing decision repeats again that the jurisdiction of Lodge #23 is only in the Brooklyn Navy Yard and also that any members of Lodge #23 not employed in the Brooklyn Navy Yard should immediately take their clearance cards and transfer the same to the Local Union having jurisdiction over their present employment. In conformity with that action, each of you who is not now employed in the Brooklyn Navy Yard should request your clearance card and deposit the same in the proper Local Union on or before January 1, 1953. I trust that each of you will comply with this direction of the Executive Council.

A special meeting of Lodge 23 was held in Mid-December to discuss matters raised by this December 4 directive of President MacGowan. According to Gallo's credible testimony, the group decided to retain attorneys and to collect a fund "to find out why they could not get employment, when there is jobs available." As a result of the meeting, Lodge 23 officers prepared and circulated the following letter among the lodge membership pursuant to which funds were received:

> The time has come for a showdown.
>
> Your Local #23 now under new officers is trying to get you work at a Union scale of wages (in our own territory).
>
> If and when another RIF happens in the Navy Yard, we want to employ you.
>
> In order to do this we need your assistance *now*, NOT LATER AFTER WE WIN.

We are asking you for a voluntary Contribution at the present time of $25.00. If you are in favor of this please check the square below.

District 2's labor agreements

From July 1950 until June 1953, including all material times here, Respondent District 2 has had agreements with the Boiler and Plate Work Erecting Contractors' Association as agent of "all its present and future [Employer] members") and with independent construction firms, including the Respondent Company. These agreements are identical in pertinent respects, and they cover "all construction, repair and maintenance work" within District 2's aforestated "jurisdiction." The contract between Respondent District 2 and Respondent Company provides that:

> * * * 1. The Employer shall employ none but building construction members in good standing in the Union on all work done by or for him on all construction, repair and maintenance work within the Metropolitan area, including the City of New York, all of Long Island, the Counties of Westchester, Putnam, Dutchess, Rockland, Orange, Sullivan and Ulster, all within the State of New York, and coming within the jurisdiction of District No. 2, as set forth in the Constitution of the International Brotherhood of Boilermakers, Iron referred to as the "International"), the Building Ship Builders and Helpers of America (hereinafter Trades Department of the American Federation of Labor, and agreements of record as to work jurisdiction entered into between the International and other Internationals and Local Unions affiliated with the A. F. of L. The Employer further agrees that he will demand and see the working cards and Building Trades quarterly cards of Employees before employing them.
>
> 2. The Union shall furnish the Employer, to the best of its ability and within a reasonable time, with such

competent mechanics and helpers as the Employer may reasonably require, on the terms and conditions contained in this Agreement.

The members of the Union shall not refuse to work with mechanics and helpers who are not members of the Union when the Union has failed to supply a sufficient number of mechanics and helpers.

3. Boilermaker Foremen and Pushers shall be paid-up members of the Union, with up-to-date quarterly Building Trade Cards issued by District No. 2.

* * *

14. A member shall be employed to assist the first three (3) welders and another member for additional three (3) welders up to six (6) welders or fraction thereof.

The duties of the member shall be servicing the welder, such as pulling cable, delivering wire, or other necessary work required by the welders to help the progress of the job.

* * *

29. The Business Manager of the Union and the job stewards shall have the right to examine working cards and pay envelopes of all members of the Union, and the Business Manager shall have the right with a committee of men employed on construction work to examine the payroll of the Employer. The Business Manager shall also have access to the work at all times. However, he shall comply with all general conditions of the job regarding passes, entrances to be used, etc.

30. It shall be the duty of the Business Manager of the Union to appoint all job stewards on every job who shall be employed at all times during the operation of the job. However, a temporary steward shall be appointed by the men employed until such time as a permanent one is appointed. No job steward shall

act in the capacity of foreman or pusher except as provided for in Paragraph 9.

31. The duty of all stewards is to enforce the rules of this Agreement and to report to the Business Manager or to the business office of District No. 2, any infractions or violations that may come to his notice. If a job steward be discharged for calling attention to any of the terms of the Agreement he shall be at once reinstated until the matter is settled as provided herein. The steward shall obtain from the office of District No. 2 any and all booklets issued by the New York State Industrial Commissioner with respect to the safety code.

* * *

37. All grievances other than those pertaining to general wage rates or jurisdictional disputes that may arise on any job covered by this agreement, shall be handled in the following manner without permitting the grievance to interfere with the progress or prosecution of the work in process:

The business manager, or one of the field representatives he may designate, shall meet with the employer for the purpose of reviewing the dispute and adjusting same.

In the event that the dispute remains unadjusted following such a review by the business manager, or one of the field representatives he may designate, and the employer, then at the instance of either party on ten days' written notice by mail, the same shall be submitted to a Board of Arbitration for determination, subject, however, to the provisions of this agreement.

* * *

39. Any provisions of this Agreement which provide for Union Security or employment in a manner and to an extent prohibited by any law or determination of any governmental board or agency, shall be and hereby is of no force and effect during the terms of

said prohibition. It is understood and agreed, however, that if any of the provisions which are hereby declared to be of no force and effect because of restrictions imposed by law, are determined either by Act of Congress or other legislative enactment or by a decision of the court of highest recourse to be legal or permissible, then any such provisions shall immediately become or remain effective during the remainder of the term of this Agreement. The Union reserves the right to renegotiate any of the provisions, which may be of no force or effect. In the event that there shall be change in applicable laws as to Union Security, the parties shall renegotiate any provisions concerning Union Security.

In the event that any provisions of this Agreement shall be declared to be in violation of law, the remaining provisions of this Agreement shall remain in full force and effect.

40. This Agreement and all the terms and conditions thereof shall be binding upon the parties hereto, their successors and assigns for a period commencing JULY 1st, 1950, and ending on the 30th day of JUNE 1953.

Additional economic considerations

Employment opportunities in the building and construction industry vary from locale to locale, from county to county, and from city to city. There may be a comparative shortage of boilermaker jobs in construction work in New York City, for example, while at the same time there may be many such jobs available in other parts of the State. Needless to say, the location of a job in relation to the boilermaker's home is an important factor in appraising the desirability of any given job for any given man. And, in addition to wage differences, still another important factor affecting the desirability of these jobs is the duration of the project—whether it be for 1 week or

1 month or 1 year or longer. The Astoria job under consideration pays substantially higher wage rates than boilermakers receive at the Brooklyn Navy Yard as is discussed later, and in recent years at least, this Astoria project has been the longest project in New York City with the highest employment rate.

The territorial trade "jurisdiction" assigned to Lodge 23 by the International Brotherhood is limited, as already noted, to the boiler room at the Brooklyn Navy Yard, a Government installation. As in much Government employment, there is occasional apprehension of layoffs or so-called reductions in force, commonly called RIFS. Moreover, boilermakers in Government employ may, for the above or any number of other reasons, desire to be engaged in private construction work rather than in Government Navy Yard employment. Whether it be because of actual RIFS, or the fear of such layoffs, or for other personal reasons, there were in April 1952 about 36 members of Lodge 23 who were not employed in the Navy Yard and who were also either employed, or seeking employment, in construction work. Apparently many such members of Lodge 23 were of the impression, rightly or wrongly need not be decided at this point, that their opportunities for such construction jobs were limited because they were not members of District 2. A majority of Lodge 23's membership was unemployed in December 1952 and the lodge decided at the special meeting that month (the same meeting at which they took up MacGowan's November 1952 letter) that "they wanted to see why they could not receive work." Lodge 23 officers Gallo and Thomas Cook had gone to the April Executive Council meeting in Kansas City, according to Gallo's credible testimony, to support Lodge 23's application for admission to District 2 because of "the matter of unemployment in Lodge 23" and "to get jobs

for members of [Lodge 23]." Meanwhile, the International policy set forth in Pendergast's letter of July 1951 has been in effect, namely, that the subordinate lodges comprising District 2 "get preference on employment on all field and construction work under the jurisdiction of District #2 and would be entitled to Building Trades Quarterly working cards" and that such reference specifically exists as against Lodge 23 or any other subordinate lodge within the geographical jurisdiction of, but not affiliated with, District 2. Pendergast's letter further provides, it is recalled, that members of these nonaffiliated lodge members do not receive Quarterly cards even when hired for work within District 2's geographical jurisdiction.

Hiring arrangement and practice between District 2 and the Company

Nacey—chairman of District 2, the business manager of District 2 and its constituent lodges, and the president of constituent Lodge 21—was District 2's sole signatory to the contract with Respondent Company; he testified that he merely sent the contract to the Company for the latter's signature after negotiating an identical agreement with the Contractors' Association. Nacey testified that District 2 has not enforced paragraph 1 of the agreement and never mentioned doing so; he also testified, however, that he had never discussed this paragraph with the Company, even before the contract was executed, and that he has never advised the District 2 membership that paragraph 1 was not intended to be enforced. Nacey further explained that the parties have operated under the contract but that in doing so he was ever mindful of paragraph 39 of the contract setting forth the so-called saving clause. However, Nacey was unable to state which contract provisions were,

by reason of paragraph 39, legal or illegal in view of the action of any governmental board or agency as stated in that paragraph.

John Hagan is the Company's boilermaker foreman at Astoria to whom the four charging individuals applied for employment, as is hereinafter discussed. The contract under consideration required that "Boilermaker Foremen and Pushers shall be paid-up members of [one of District 2's constituent lodges], with up to date quarterly Building Trade Cards issued by District No. 2." Hagan is a member of Lodge 21, the same constituent lodge of which Nacey is president and business manager. Hagan testified that he considers himself bound by the International's constitution and that he was specifically familiar with the constitutional requirement that members of the International "shall, if possible, avoid working with nonunion mechanics and helpers of our trade, and shall use their best efforts to encourage the Mechanics and Helpers to join this International Brotherhood."

Hagan testified that he had no knowledge of the existence of District 2's contract with the Company, and that the Company had never given him a copy of the contract or otherwise instructed him to follow its provisions or the provisions of any other contract. Hagan also testified that no company representative has ever instructed him to reject any boilermaker applicants who belong to Lodge 23 or who do not belong to either the International Brotherhood or District 2 or who do not have Building Trades Quarterly Cards or are not referred by District 2. When asked whether he "has been required by the union or anyone else to employ only union men," Hagan replied, "Not necessarily, it is supply and demand." Nacey testified that Nacy had never given Hagan instructions not to hire Lodge 23 men or men without Building Trade Cards.

Hagan further testified, however, that he has read and is otherwise familiar with the provisions of the so-called Blue Book (the contemporaneous contract between District 2 and the Contractors' Association, the relevant provisions of which are identical to the aforestated provisions of District 2's contract with the Company) and that constituent lodges of District 2 distributed copies of this Blue Book to their members. Hagan testified that as a "Union Member" he was required to refer to the entire Blue Book and "as foreman" he had "to go along with the book" and that he did in fact follow this Blue Book on the Astoria project.

Hagan further testified concerning his actual hiring practices at the Astoria project. He and the job superintendent decide how many boilermaker employees are needed at any given time. Hagan then calls District 2's Day Hall for men, and if the District is unable to supply his needs then he hires boilermakers who shape up at the project gate. Hagan follows the Blue Book in hiring individuals, as noted above, and he always checks the union membership of employees before engaging them; he does not now have, nor has he ever had, employees on the job who are not International Brotherhood members. While Hagan further stated that membership in a particular lodge does not influence his selection of men for hire, he also testified that he would hire men "as long as they are * * * members of the International Boilermakers" and that he asks applicants for their Quarterly Cards when he does not know them; that he hired men with Quarterly Cards at the beginning of the project allegedly in order to have the best qualified personnel to get the project started, but that he would hire men without such Cards depending on "supply and demand." Hagan thus explained: "If we did not have enough men, then we would take * * * boilermakers from *other* [Boilermaker"] locals, or other strange

men, who have worked in the outside building construction field."

It is recalled that District 2 had contemporaneous contracts with other construction concerns on all its various jobs throughout Connecticut and New York State, as well as its contracts with the Respondent Company and the Contractors' Association, and that all such contracts are identical in material respects. Claiming that Paragraph 1 of all these other contracts was not enforced and that such circumstance would support its assertion that Paragraph 1 of Respondent Company's contract also was not enforced, District 2 showed that two of the alleged discriminatees and other members of Lodge 23, as well as other boilermakers unaffiliated with District 2, were employed on various boilermaker projects within District 2's "jurisdiction." District 2 also showed, in this same connection, that boilermakers who were not members of District 2 have been employed at the Astoria project, including some members of Lodge 23.[7] Those boilermakers, who obtained such employment within District 2's "jurisdiction" and who were not members of District 2, did not present Quarterly Cards—for none had been issued to them—in order to obtain and retain this employment.

[7]The following table is extracted from this evidence as to the Astoria job. The heading, "No. of Men," refers to total number of boilermakers on the job; the figures in the next column, entitled "Non-Dist. 2," are included in the "No. of Men" column; and the figures in the last column, headed "Lodge 23," are included in the preceding two columns. Thus, for the week ending October 1, 1952, there were 109 boilermakers on the project, of which number 8 were not members of District 2, and 1 of the 8 was a member of Lodge 23. All 109 were members of the International.

Wk. Ending	No. of Men	Non-Dist. 2	Lodge 23
Oct. 1, 1952	109	8	1
Oct. 29, 1952	119	9	1
Dec. 3, 1952	150	11	1
Jan. 7, 1953	157	10	1
Feb. 4, 1953	199	27	2
Mar. 4, 1953	220	45	2
Apr. 1, 1953	204	41	1
May 6, 1953	198	40	1
May 20, 1953	234	39	1

District 2 also called individual witnesses who testified to the same general effect, namely, that they obtained employment as boilermakers within District 2's "jurisdiction" even though they were not members of District 2 and accordingly had no Building Trades Quarterly Cards at the time. However, one of these witnesses, Frank Hamill, testified that while a member of Lodge 23, he applied for and obtained such employment in Glenmont, New York, after the hiring foreman asked for and Hamill showed the foreman his "union ticket." Another member of Lodge 23, respondent witness William H. Connelly, similarly got such job upon presentation of his "union dues" card to the foreman. Thomas Duffy was another member of Lodge 23 who obtained employment on various projects within District 2's "jurisdiction." Respondent witness Duffy testified that hiring foremen on such jobs always ask to see an applicant's "union card" and that "if you have no card, you don't go to work."

Thomas Sullivan was another witness called by District 2. Although testifying at one point that he began working at the Astoria project in 1953 while still a member of Lodge 23, Sullivan's further testimony demonstrates that he became a member of Lodge 45—one of the five component lodges of District 2—before such employment began. Sullivan also testified, in any event, that he obtained such job through District 2 and that Walter Graber, a District 2 field representative and an assistant of District 2 Business Manager Nacey (there will be more identification of Graber later in this Report), "hired me in the [District 2] Day Hall" and that Graber instructed Sullivan "to go to work in Astoria." Sullivan accordingly reported to Foreman Hagan. When asked at the hearing whether Sullivan informed Hagan at the time that Graber had sent him to Hagan, Sullivan replied: "He [Hagan] seemed to know

just about what it was. He asked me what local it is, I told him 45. Rather, he said, 'Where do you come from.' I said, '45.'" Hagan said nothing further upon hiring Sullivan, and merely sent Sullivan to the timekeeper's office.

Specific cases of alleged discrimination

The General Counsel contends that the four named individuals applied for work at the Astoria project, one in December 1952[8] and all in January 1953, and that they were discriminatorily refused employment because of an unlawful hiring arrangement between the Company and District 2. Because the Respondents raise issues concerning the bona fides of the respective applications, it is necessary to set forth in greater detail than ordinarily necessary the individual situation of the respective applicants.

Harry Nacey, the chairman and business manager of District 2, has his office in New York City at 14th Street and 4th Avenue. District 2 also maintains a "Day Hall" on 23rd Street where, according to Nacey, boilermakers of any lodge gather to obtain employment information. Nacey has three assistants or so-called field representatives, namely, Walter Graber, Charles Alexander, and Daniel Boylan. Graber is also Secretary of District 2 and a Trustee of Lodge 21 (Nacey's own lodge), both being elective posts. Alexander is also vice president of Lodge 21, chairman of its board of trustees, and Lodge 21's delegate on District 2's Board —an elective post. Boylan, together with Nacey, represented District 2 in its aforementioned conferences with Lodge 23 under Pendergast's auspices (see Pendergast letter of July 6, 1951), and he and Graber were signatories, in behalf of District 2, of District 2's aforementioned

[8]The complaints were amended at the hearing to cover the December 1952 application. See *N. L. R. B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 783 (C. A. 2), and cases cited therein.

agreement with the Contractors' Association. Their regular duties require these field representatives to devote a portion of their time at the Day Hall, as well as at the District (Nacey's) office, and they also regularly visit job sites at which District 2 members[9] are employed. Alexander testified, in this connection, that he does not examine "working cards" at the jobs, that "usually the steward takes care of that. *Otherwise, men wouldn't be on the job.*"

Nacey's office at 14th Street receives job information from the various projects which is in turn given to Graber, Alexander, and Boylan at the District's Day Hall where unemployed boilermakers congregate and where, according to Alexander, "we look for the men to shape up and send them out and tell them where the jobs are." According to Nacey, these three individuals are merely supposed to post this job information for the benefit of unemployed boilermakers.[10]

Stephen Mrazek, a member of Lodge 23 at all times material here, has been engaged in boilermaker work, including construction or field work, for 17 years. At various times in 1952 and 1953 Mrazek has been employed on jobs within the "jurisdiction" of District 2 and covered by District 2 contracts in Albany, Garden City, Dan Kamer Point, and Peekskill. On another project several years before, Mrazek had worked under Hagan's foremanship.

Mazek was laid off from the aforementioned Garden City job for economic reasons on or about December 3, 1952. His wife was seriously ill at the time and her physician advised Mrazek that her condition was such that Mrazek should obtain employment near Mrazek's home which is in Mt. Vernon, New York.

[9]District 2 actually has no members as such. In this and similar contexts, I refer to the members of the five lodges comprising the District.

[10]Based upon an analysis of their testimony and observation of their demeanor as witnesses, Nacey, Alexander, Boylan, and Graber were evasive and unreliable on critical issues.

On December 4, 1952, Mrazek approached Foreman Hagan at the Astoria job site and inquired as to "chances of getting on." Mrazek tendered Hagan his Lodge 23 union book at the same time. Looking at the book, Hagan observed, "You haven't got a Building Trades Card?" and Mrazek replied he hadn't. Hagan then stated, "I am sorry, my hands are tied here. I need men, but you go down to 14th Street and get the okay. I will put you on as soon as you come back." The next day, Mrazek went to the District's Day Hall on 23rd Street where he asked Field Representative Daniel Boylan for a job at the Astoria project, and he related to Boylan his (Mrazek's) conversation with Hagan. Boylan merely replied, "You haven't got a Building Trades Card. You know how it is," to which Mrazek commented, "No; I haven't got a Building Trades Card, but I need a job."[11]

Mrazek sought employment at the job site approximately three times in December 1952, each time without success. He returned to the project again on January 5, 1953, and had a conversation with Hagan similar to one they had on December 4. That same day, January 5, Mrazek went to the District office on 14th Street and told the office secretary that he wanted to see Nacey concerning a job at Astoria. The secretary asked Mrazek to leave his phone and union registration numbers, stating that either she or someone else would call Mrazek the following day. No one called. At the Day Hall early in January 1953, Mrazek also inquired of Field Representative Graber concerning employment at Astoria whereupon Graber questioned concerning his lodge number. When Mrazek then showed Graber his Lodge 23 union book, Graber remarked that Mrazek was "in very good standing." Mrazek repeated his request for employment at Astoria, whereupon Graber

[11]I do not credit Boylan's testimony that this conversation did not occur as set forth above.

finally commented, "Look, you know what the score is; I don't have to tell you anything."[12]

Mrazek was unemployed from December 4, 1952, until sometime in February 1953, when he obtained boilermaker employment in Newburg, New York. A trustee of one of District 2's constituent lodges sent Mrazek to this job when Mrazek, while in the Day Hall one day in February, stated he would accept such employment.

Joseph Marin, *Walter Smith*, and *Michael Duncovich* have been members of Lodge 23 at all material times.

Marin has been a boilermaker for 14 years and, since 1945, has been engaged in construction work within District 2's "jurisdiction" as his present job is. Apart from the incident involving his job application at the Astoria project, as related hereinafter, Marin has not been asked for a Building Trades Card or District 2 clearance in obtaining employment. Marin was unemployed on January 8, 1953, when he made such application at Astoria. He has since been employed on various jobs, including one which paid an hourly rate of $1.80 as compared with Respondent Company's rate of $3.30 an hour at the time.

Smith has been in the boilermaker trade for 35 years, including jobs in construction work and one such job at another project several years ago was under Hagan's foremanship. Smith has not been engaged in Government, as distinguished from private construction, work for 10 years. His hourly rate of pay was $2.10 on January 8, 1953, and is presently $2.06; the Respondent Company's wage scale at Astoria was $3.30 an hour in January 1953, and is now $3.50 an hour.

Duncovich has been a boilermaker for 20 years, during part of which period he has been engaged in construction work. Duncovich is employed at the Brooklyn Navy Yard.

[12] I do not credit Graber's conflicting testimony.

where he has been since 1951. In January 1953, Duncovich's gross salary was $84.40 for a 40-hour week, as compared with Respondent Company's scale of $132. Duncovich testified that he was desirous of getting into private employment because of its higher wage rates and that this was his reason for seeking employment at the Astoria project on January 8, 1953.

Smith and Marin went to the project on the morning of January 8, 1953, and asked Foreman Hagan for boilermaker employment. Hagan inquired of which lodge they were members and whether they had Building Trades Quarterly Cards. When they informed Hagan that they were Lodge 23 members and had no Quarterly Cards, Hagan replied that he couldn't do anything for them but that he would hire them if they obtained an "Okay" from District 2 headquarters at 14th Street. Smith and Marin then went to the District's 14th Street office where they spoke with Field Representative Graber. They related to Graber their conversation with Hagan including Hagan's statement that he would employ them if they obtained an "Okay." According to Smith's and Marin's credible testimony, Graber told both men that "he was sorry, he couldn't do nothing for us, that they had men winding up on other jobs, and they were holding those jobs for their [the District's] membership." When Smith then remarked that "we used to get jobs out of there," Graber agreed that was so but explained that "he only gave us the work when they were very busy and had an abundance of work to spread around."[13]

On January 8, Duncovich also asked Hagan for a job at the project. Hagan inquired whether Duncovich, as well, had a Building Trades Card. And when Duncovich replied that he was a member of Lodge 23 and did not have such

[13] I do not credit Graber's different version of this conversation.

card, Hagan stated, according to Duncovich's credibile testimony, that Duncovich should "go downtown and get fixed up. I can't do nothing for you." Duncovich then went to the Day Hall on 23rd Street where he asked Field Representative Alexander for a job, Field Representative Boylan also being present at the time. Alexander asked whether Duncovich had a Building Trades Card, and, when Duncovich replied he had none, Alexander stated that Alexander "hadn't anything at the present time"[14] and Boylan remarked that Duncovich "was getting old." From the Day Hall, Duncovich went to District Headquarters on 14th Street where he asked Field Representative Graber for a job and related his conversation with Foreman Hagan earlier that day. Duncovich showed Graber his "Union book" at Graber's request, whereupon Graber said there were no jobs and that Hagan "should know better" than to send Duncovich to the District office.

Conclusions as to unlawful hiring arrangement and practice

The facts plainly show, in my opinion, that membership in the Boilermakers is a condition of employment at the Astoria project, and that such condition was part of the employment arrangement between Respondent District 2 and the Respondent Company. Whether, on its face, paragraph 39 has the effect of postponing the operative date of the union security provisions of paragraph 1 and I find it did not have such effect[15]—the actual employment

[14] I do not credit Alexander's contrary testimony.

[15] *N. L. R. B.* v. *Philadelphia Iron Works, Inc., and Local No. 13, International Brotherhood of Boilermakers etc.*, decided April 7, 1954 (C. A. 3), enforcing 103 NLRB 596, 619; *N. L. R. B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 780 (C. A. 2); *Ebasco Services Incorporated and International Brotherhood of Boilermakers, etc.*, 107 NLRB No. 143; *Local 1664 (Dock Division) I.L.A. District Council No. 1, et al.*, 103 NLRB 1217, 1239.

practices in this case are nevertheless shown to have operated as if paragraph 39 were not in the contract, whatever construction it be given. Moreover, rather than support Respondent District 2's position that paragraph 1 was inoperative, the practice under Respondent District's other contracts further shows that Boilermaker membership was an actual condition of employment at these other projects as well.

What the record establishes as to those projects within District 2's trade and geographic "jurisdiction" and covered by its contracts is a practice wholly in accord with Pendergast's letter of July 1951, namely, that boilermaker work in the construction line was given only to members of the International Brotherhood, and that first preference was given to members of District 2's constituent lodges. That some members of lodges unaffiliated with District 2 also obtained employment within District 2's vast territorial jurisdiction does not show otherwise or even support a contrary result in view of the present circumstances; for the employment of such other Boilermaker lodge members *after* District 2 preference was satisfied is expressly contemplated by the Executive Board decision. Some jobs are more desirable than others, depending on location of project, wages, duration of job, and the like. While some jobs on projects in Connecticut or upper New York State or in New York City or even at the Astoria project itself were thus held by some members of lodges unaffiliated with District 2, all it means in this case is that District 2 lodge members were unavailable to assert their preference for such openings at the time, or that the particular hiring foreman or Nacey or one of Nacey's assistants gave special consideration to such applicant—but all within "the closed circle" of Boilermaker membership. See *N. L. R. B.* v. *Swinerton*, 202 F. 2d 511, 515 (C. A. 9), cert. denied 346 U. S. 814.

At the hearing Respondent District took the position that the International Brotherhood has the right, under the proviso to Section 8 (b) (1) (A) of the Act, to determine the jurisdiction of its subordinate lodges and thereby fix the employment opportunities of members of its respective lodges.[16] Such practice is precissely what the General Counsel is in effect claiming that District 2 and the Company have carried out under their employment arrangement, and Section 8 (b) (1) (A) hardly justifies the practice and arrangement. As far as the Act is concerned, a labor organization may charter as many lodges as it desires, assign to them whatever territorial and trade jurisdiction it pleases, and promulgate whatever transfer and clearance and other similar membership regulations it wants. *But* a labor organization may not take further action, on the basis of its internal structure and rules, as to cause or attempt to cause an employer to discriminate against employees because of these union considerations. "* * * while the proviso to Section 8(b) (1) (A) protects the union's rights to prescribe its own rules with respect to the acquisition or retention of membership therein, it does not authorize the union to extend the effective scope of those rules so that they determine the right of a member to the acquisition or retention of a job." *N. L. R. B.* v. *Philadelphia Iron Works, Inc., and Local 13, International Brotherhood of Boilermakers, etc.*, decided April 7, 1954,

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[16]For example: International Vice President Arthur P. Smith testified that, because of the migratory nature of construction work and in order to be able to provide employers with a source of competent boilermakers, the International allocates construction trade jurisdiction to certain lodges in order "to protect [the members of such lodges] from the invasion of that work by other boilermakers [of other subordinate lodges]." And, as already noted, International Vice President Pendergast also stated that a member of a particular subordinate lodge is expected, under his obligation as a union member, to "confine his activities as a boilermaker to the jurisdiction assigned to [that] particular lodge." And counsel also asserted District 2's contention to be that the International decides the "jurisdiction" of its various subordinate lodges and that such determination "is binding on the rights of employees in seeking employment in the boilermaker field."

(C. A. 3).[17] Respondent District's contention would, if successful in this regard, destroy one of the very objectives which the Act is intended to accomplish.

The situation involving the four specific cases of alleged discrimination is further evidence of the actual arrangement between the Respondents and points up the essential unlawfulness of the situation. Thus there is Foreman Hagan, exercising managerial prerogatives of hire, who is required by the contract to be a Boilermaker member and who is required by the Boilermaker constitution to observe the aforementioned obligations of such membership. (These circumstances alone would spell out an unlawful hiring arrangement.) Hagan did not reject the men either for lack of ability to perform the job or for lack of jobs. Rather, he required these men to obtain an "okay" from District 2 in order to give them employment, and District 2 refused such approval because the jobs were being saved for members of District 2's constituent lodges.

Saving for final discussion various contentions as to the charges in this case, which contentions are hereinafter rejected, I conclude that both Respondents have maintained and performed a hiring arrangement under which, and without benefit of the required 30-day grace period, membership in the International Brotherhood was a condition of employment with preference for members of District 2 or other International Lodge members referred or cleared by District 2, and Building Trades Quarterly Cards being a form of such clearance. Respondent Company has thereby violated Section 8 (a) (1) and (3) of the Act, and Re-

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[17] *International Brotherhood of Boilermakers, etc., and Consolidated Western Steel Corporation*, 94 NLRB 1593-1594; *Local 13, International Brotherhood of Boilermakers, etc. (The Babcock & Wilcox Co.)*, 105 NLRB No. 31; *Local 153, International Union, United Automobile, etc.*, 99 NLRB 1419, 1421; *Pope Broadcasting Co.*, 104 NLRB No. 2; *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008, 1011 (C. A. 7), cert. denied 342 U. S. 815.

spondent District 2 has thereby violated Section 8 (b) (1) (A) and (2) of the Act.[18]

Propriety of the charges; conclusions as to the refusals to hire

It is recalled that, at its meeting in mid-December 1952, Local 23 decided to retain counsel and collect funds to further its efforts in obtaining construction employment for Lodge 23 members. This was tied in, it is further recalled, with Lodge 23's efforts to become affiliated with District 2. Counsel was engaged thereafter, sometime before January 8, 1953, and this counsel is the same firm of two attorneys who filed the charges in behalf of the four aforementioned charging parties in this case and otherwise represented the charging parties in this proceeding.

One of the charging parties, Mrazek, first applied for employment at the Astoria project on December 4, 1952. Mrazek and the three other charging parties applied for such employment on January 8, 1953. Upon their failure to obtain employment, as already related, these individuals notified Gallo, an officer of Lodge 23, and Gallo arranged to meet with them at the offices of counsel whom Lodge 23 had retained after the mid-December meeting. The meeting with counsel was held in January 1953, and charges in this case were filed later that month against Respondent

[18] *Philadelphia Iron Works and Local No. 13, International Brotherhood of Boilermakers, etc.*, 103 NLRB 596, enforced April 7, 1954 (C. A. 3); *Local 13, International Brotherhood of Boilermakers, etc. (The Babcock & Wilcox Co.)*, 105 NLRB No. 31; *Local 803, International Brotherhood of Boilermakers, etc.*, 107 NLRB No. 212; *Ebasco Services Incorporated and International Brotherhood of Boilermakers, etc.*, 107 NLRB No. 143; *International Brotherhood of Boilermakers, etc., and Consolidated Western Steel Corporation*, 94 NLRB 1590; *Permanente Steamship Corp.*, 107 NLRB No. 234; *N. L. R. B. v. Gottfried Baking Co., et al.*, 210 F. 2d 772 (C. A. 2); *N. L. R. B. v. George D. Auchter*, decided January 15, 1954 (C. A. 5); *N. L. R. B. v. McGraw and Co.*, 206 F. 2d 635 (C. A. 6). Under the circumstances, Respondent Company is responsible for the conduct of Foreman Hagan, and Respondent District 2 is responsible for the conduct of Nacey, Graber, Alexander, and Boylan.

Company and in April, 1953, against Respondent District 2. Gallo testified that one of the reasons for originally retaining the attorneys was to file unfair labor practice charges with the Board, and the record shows that the charges in the present matter were filed as a result of the January meeting in counsel's office which Gallo and the four charging parties attended.

Lodge 23 was not in compliance with the filing provisions of Section 9 of the Act when the complaint was issued in this matter; nor had it achieved such compliance at any earlier date. Claiming that the four aforementioned parties were merely "fronting" for Lodge 23 in filing the charges in this case, the Respondents move for dismissal of this proceeding in view of the statutory requirement that no complaint be issued "pursuant to a charge made by a labor organization * * * unless such labor organization [shall have satisfied the filing provisions of Section 9 (f), (g), and (h) of the Act]."[19] Respondents, on this "fronting" issue, rely principally on *N. L. R. B.* v. *Alside, Inc.*, 192 F. 2d 678 (C. A. 6) and on *N. L. R. B.* v. *Happ Bros.*, 196 F. 2d 195 (C. A. 5).

Respondents further assert that this case essentially involves Lodge 23's efforts to advance its own position in a "jurisdictional dispute" with District 2. Claiming that a request for relief by the filing of charges in such a situation constitutes an abuse of the Board's processes, the Respondents move to dismiss the proceeding on such basis and they cite in this latter connection the Board's decision in *Vaughn Bowen*, 93 NLRB 1147.

It is clear, to consider the contentions in reverse order, that discrimination against emloyees may not be excused on "abuse of process" grounds merely because such discrimination arises out of a conflict or jurisdictional dis-

[19]See *N. L. R. B.* v. *Highland Park Manufacturing Co.*, 341 U. S. 322.

pute between labor organizations. Indeed, so-called jurisdictional disputes are responsible for the enactment of substantial portions of Section 8 (b) (4) and (10) (k) of the Act, and the Board and the Courts have recognized so-called jurisdictional disputes as the operative circumstance underlying violations of the same provisions of the Act as are involved in this case.[20] There is no more reason, in my opinion, to deny relief for discrimination stemming from a union's differences with a sister local of the same parent international than where employees are discriminatorily denied employment because of a conflict between two competing internationals or because of a conflict between a majority of employees in a unit and a union which would represent them or an employer which would reject them.

In the aforementioned *Vaughn Bowen* case the Board denied relief to two employees who were allegedly discharged discriminatorily in a context of a jurisdictional or recognition struggle between two unions. In that case it was agreed between the employer, the two dischargees, and one of the two rival labor organizations that the employer would hire and then fire the two individuals for alleged union reasons. The employer in question did not need the two employees when he purportedly hired them and it plainly appeared that what the Board called a "token" hiring and firing was solely for the purpose of making a case of alleged discrimination in order to assist one of the two competing unions. The Board found that a *bona fide* employment relationship was never established, for none was ever intended—either by the individuals or the employer, and it accordingly denied relief as to the two individuals.

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[20] E.g., *N. L. R. B.* v. *Lummus Co.*, 210 F. 2d 377, 379 (C. A. 5); *McGraw Construction Co., Inc.*, 107 NLRB No. 210.

The present case is completely unlike the *Vaughn Bowen* situation. Clearly, each of the four charging parties in the present case desired employment at Astoria and made a *bona fide* effort to obtain such employment—two were unemployed at the time and the other two were making substantially less money than Respondent Company paid its boilermaker employees. And(as in *N. L. R. B.* v. *Swinerton, et al.*, 202 F. 2d 511, 515 (C. A. 9), certorari denied 346 U. S. 814, the record establishes that the four men "would have accepted work if it had been tendered." I accordingly reject Respondents' abuse-of-process contention.

The fronting contention is essentially based on the fact that Lodge 23 assisted the individuals in filing the charge and perhaps paid (which I assume it did) counsel for participating in the matter, that Lodge 23 retained the same attorneys in respect to Lodge 23's differences with District 2, and that Lodge 23 stands to gain by an affirmative Board order here. It is well-established, however, that individual employees are not to be denied rights under the Act because they are members of a noncomplying union and have been actively assisted and even directed by such union in the filing of charges and also because such noncomplaint may derive some incidental benefits from a Board order. Thus, the Ninth Circuit Court of Appeals in *N. L. R. B.* v. *Ronney & Sons Furniture Manufacturing Company*, 206 F. 2d 730, 731, certiorari denied 346 U. S. 937, rehearing denied 347 U. S. 914, held that Local 576 involved in that case is not a charging party even though "the charges were solicited and prepared by Local 576 and counsel for that union represented the nominal charging parties at the hearing." The Court stated (206 F. 2d, at p. 732):

> *Employees acting individually may assert their rights before the Board without restriction of Section 9 (h).*

In the instant case the unfair labor practice charges were signed and filed with the Board by ten former employees of respondent, each alleging discrimination and other unfair labor practices as against himself or herself individually. The charges were in form and in substance assertions of individual rights. *They were not made less so because Local 576 assisted or directed the employees in preparing the charges, or because counsel for Local 576 represented the employees at the Board hearing, or because Local 576 might incidentally benefit from the Board's order.* The problem is essentially the same as in *N. L. R. B.* v. *Globe Wireless*, 9 Cir., 193 F. 2d 748, note 1, where we quoted with approval from *N. L. R. B.* v. *Augusta Chemical Co.*, 5 Cir., 187 F. 2d 63, 64, as follows:

> "Granted that the disqualified union was active in assisting, indeed directing, the employees in preparing their charges, it does not at all follow that the employees, by accepting that assistance, disqualified themselves."

Nothing to the contrary can be found in *N. L. R. B.* v. *Happ Bros.*, 5 Cir., 196 F. 2d 678, on which respondent relies. In each of those cases the court held that where the president and chief protagonist of the interested but disqualified union had filed unfair labor practice charges on behalf of himself and a great number of other union employees, he was really acting as a representative of the union and not as an individual. Those cases have no application here. (Emphasis added.)

The Fifth Circuit Court of Appeals in *Southern Furniture Mfg. Co.* v. *N. L. R. B.*, 194 F. 2d 59, 61, certiorari denied 343 U. S. 964, also distinguished the *Alside* decision upon which Respondents rely. In the *Southern Furniture* case the Court followed its decision in *N. L. R. B.* v. *Augusta Chemical Co.*, 187 F. 2d 63, where a noncomplying

union assisted individual employees in filing charges. The Court rejected a fronting contention as follows (187 F. 2d, at p. 64):

> Whatever may have been, or may be, the real purpose of the Statutes under which these proceedings are maintained, its avowed purpose was not to favor or promote unions as such. It was to promote and protect the rights of individual employees to join or not to join unions and to be free from coercion and interference either way.
>
> *Because in practice the unions, as such, have dominated and are dominating, the scene on which these dramas unfold, it may not be said that individual employees have no right to act individually in asserting and vindicating their rights.* To do so is to put the cart before the horse, to sublimate the agent about the principal, to make the tail wag the dog.
>
> We are in complete disagreement with the Respondent's position on this point. *Granted that the disqualified union was active in assisting, indeed directing, the employees in preparing their charges, it does not at all follow that the employees, by accepting that assistance, disqualified themselves.* (Emphasis added.)

In its *Happ* case cited by Respondents, the Fifth Circuit affirmed, by distinguishing, its *Southern Furniture* and *Augusta Chemical* decisions.

Similarly, in *N. L. R. B.* v. *Coal Creek Coal Co.*, 204 F. 2d 579, 582, and in *N. L. R. B.* v. *Clausen d/b/a Luzerne Hide & Tallow Company*, 188 F. 2d 439, 443, certiorari denied 342 U. S. 868, the Tenth and Third Circuit Courts of Appeals respectively rejected fronting contentions where charges were filed by individuals who were officers of noncomplying unions (the four charging parties in the present case were not officers, nor were they shown to be principal union protagonists), even though it was urged

in the *Coal Creek Coal* case, for example, that the charge was "in reality instigated and conducted" by the non-complying union of which the charging individual was an officer.

The *Ronney, Augusta Chemical, Southern Furniture, Coal Creek Coal,* and *Clausen* cases are directly applicable here, and I accordingly conclude that the four charging parties made *bona fide* applications for employment and, upon thus being denied, properly filed their charges as individuals asserting their own individual rights, and not as "fronts" for Lodge 23.[21] And I also conclude, upon all the foregoing, that Respondent Company violated Section 8 (a) (1) and (3) of the Act by refusing and failing to hire the four charging individuals because they were not either members of constituent lodges of District 2 or approved or cleared by District 2, and that by reason of the aforementioned agreement or arrangement Respondent District 2 violated Section 8(b) (1) (A) and (2) by causing Respondent Company so to discriminate against these named individuals. (See cases cited in footnote 18, *supra.*)

I have found earlier in this Report that both party Respondents maintained and performed an agreement or arrangement requiring membership in, or clearance by, District 2 as a condition of employment and/or giving employment preference to members of District 2's constituent lodges. Before even an agreement with valid union-security provisions may be maintained or performed, it is required by Section 8 (a) (3) of the Act that the labor organization party to such agreement be in compliance with the filing requirements of the Act. I have administratively inquired of the General Counsel respecting the compliance status of District 2 and its constituent lodges — which constituent lodges are labor organizations within the mean-

[21] I also find no merit in the related contention respecting the manner in which the charge form was filled in.

ing of the Act, and the General Counsel has administratively advised me that as of May 3, 1954, the Board's Second Region (New York, New York), has no record which shows such compliance at any time by Lodge 21 (headquarters in New York, New York), Lodge 24 (head quarters in Brooklyn, New York), Lodge 200 (headquarters in Staten Island, New York), and by District 2 (an admitted labor organization which represented its constituent lodges and executed and administered in their behalf the contract with Respondent Company). Having found that Respondents have maintained and performed an agreement or arrangement with union-membership conditions of employment, I further find that such conduct is also violative of Section 8 (a) (1) and (3) by the Company and of Section 8 (b) (1) (A) and (2) by District 2 because of the failure of District 2 and Lodges 21, 24 and 200 to comply with the filing requirements of Section 9 of the Act.

III. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in Section II, above, occurring in connection with the operations of the Respondent Company described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructiong commerce and the free flow of commerce.

IV. The remedy

The record establishes that Respondent District 2 has had contemporaneous contracts with a great number of construction firms operating within District 2's vast territorial jurisdiction, and Respondent District 2 itself asserts

that those contracts and the practices thereunder are identical to the contracts and practices in effect at the Astoria project. It appears necessary to have the broadest type order against District 2 "since there is every reason to anticipate that if not deterred, respondent would pursue the same discriminatory policies at every project within its [jurisdictional] area" (*N. L. R. B.* v. *The Lummus Company*, 210 F. 2d 377, 381 (C. A. 5). See also *McGraw Construction Co., Inc.*, 107 NLRB No. 210, and cases cited therein). Although not specifically named as party respondents in this case, the constituent lodges of District 2 are in the same legal, equitable, and administrative position as District 2 for purposes of this action. District 2 negotiated, executed and administered the various contracts for the membership of these particular lodges, it having no separate membership of its own, and the officers and delegates to District 2 are elected by these lodges. Accordingly, I consider each of the constituent lodges to be included within the designation of District 2 as a party respondent in this action, and the conclusions of law and recommended order made in this Report as to District 2 apply, as well, to these five constituent lodges. I shall also recommend an appropriate cease and desist order as to Respondent Company.

I shall further recommend that Respondent Company offer employment to the four charging parties and that both Respondents, jointly and severally, make each of them whole for any loss of pay suffered by reasons of the discrimination, by paying a sum of money equal to that which he normally would have earned from December 4, 1952, in the case of Mrazek, and from January 8, 1953, in the cases of the three others, until tender of employment, less net earnings during said period. District 2's back pay liability shall be tolled, however, 5 days after it serves

written notice on the Company that it does not object to the immediate employment of the charging parties. Back pay shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289.

Conclusions of Law

1. The Babcock & Wilcox Company has engaged in and in engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act, by maintaining and performing an unlawful employment agreement and/or arrangement and by discriminatorily refusing to hire the four charging parties.

2. District No. 2, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) and Section (2) (6) and (7) of the Act, by maintaining and performing an unlawful employment agreement and/or arrangement and by causing The Babcock & Wilcox Company to discriminatorily refuse employment to the four charging parties.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that:

1. The Babcock & Wilcox Company, New York, New York, and its officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to, in connection with any of its projects or operations, any employment arrangement or agreement or practice

with District No. 2 or with any other subdivision or subordinate lodge of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, or with the International Brotherhood, which arrangement or agreement or practice requires membership in or referral or clearance by any labor organization except as provided in an agreement valid under the Act, including the compliance provisions of Section 9 of the Act.

(2) In any like or related manner, encouraging membership in District No. 2 or in any other subdivision or lodge of the aforesaid International Brotherhood or in the International Brotherhood or in any other labor organization, or discouraging membership in Boilermaker Lodge 23 or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except as such rights may be affected by an agreement authorized under the Act.

(b) Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Offer employment to the four charging parties as described in the Section herein entitled "The remedy."

(2) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due in accordance with this Order.

2. District 2, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, New York, New York, and all its officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Performing, maintaining, or otherwise giving effect to any employment agreement or arrangement or practice with The Babcock & Wilcox Company or with any other employer within the meaning of the Act, which agreement or arrangement or practice requires membership in or referral or clearance by any labor organization, including a tender of Building Trades Quarterly Cards, except as provided in an agreement valid under the Act, including the compliance provisions of Section 9 thereof.

(2) In any like or related manner causing or attempting to cause The Babcock & Wilcox Company, or any other employer, to discriminate against employees within the meaning of the Act.

(3) Otherwise restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except as such rights may be affected by an agreement authorized under the Act.

(b) Advise The Babcock & Wilcox Company that it withdraws all objections to the hiring of the four charging parties and of all other boilermaker employees who are not members of District 2 or of any other labor organization or who do not have Building Trades Quarterly Cards or who are members of Lodge 23.

3. Respondent Company and Respondent District 2 shall make whole the four charging parties in the manner set forth in the "Remedy" section above.

4. Respondent Company and Respondent District 2 shall post immediately, in conspicuous places, in all locations where notices to employees and members are customarily posted, the respective copies of the notices attached hereto and marked Appendix A for the Company and Appendix B for District 2. Copies of said notices, to be furnished by the Regional Director for the Second Region shall, after being signed by a duly authorized officer or agent, be

posted and maintained by each of said Respondents for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the respective Respondents to insure that said notices are not altered, defaced, or covered by any material. District 2 shall post such notice at all projects of all employers within its jurisdictional reach where it represents boilermaker employees.

It is further recommended that unless the Respondents, and each of them, shall within twenty (20) days from the receipt of this Intermediate Report, notify the aforesaid Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the noncomplying Respondent or Respondents to take the action aforesaid.

Dated at Washington, D. C., this .... day of May, 1954.

RALPH WINKLER
Trial Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that

WE WILL NOT require employees or applicants for employment to be members of, or to obtain clearance or job referrals from, DISTRICT 2, INTERNATIONAL BROTHERHOOD OF BOILER-

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MAKERS, AFL, or from any other labor organization, as a condition of employment, except in conformity with Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or otherwise give effect to any hiring agreement or arrangement or practice with DISTRICT 2 or with any other labor organization except as authorized by Section 8 (a) (3) of the Act.

WE WILL NOT encourage or discourage membership in any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL reinstate and make whole the following individuals for the discrimination against them:

Stephen Mrazek
Walter Smith
Michael Duncovich
Joseph Marin

All our employees are free to become, remain, or to refrain from becoming or remaining, members of the above-named unions, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee or applicant for employment be-

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cause of membership in or nonmembership in any such labor organization.

THE BABCOCK & WILCOX COMPANY
(Employer)

By.....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

TO ALL MEMBERS OF DISTRICT NO. 2, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, AFL

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause THE BABCOCK & WILCOX COMPANY, or any other employer, to require employees or applicants for employment to be members of the Boilermakers or of any other union or to obtain clearance or job referrals from us or to tender Building Trades Quarterly Cards as a condition of employment, except as permitted by Section 8 (a) (3) of the Act.

WE WILL NOT perform, maintain, or otherwise give effect to any hiring agreement or arrangement

or practice with THE BABCOCK & WILCOX COMPANY, or with any other employer, except as authorized under Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause THE BABCOCK & WILCOX COMPANY, or any other employer, to discriminate in any manner against employees or applicants for employment in violation of Section 8 (a) (3).

WE WILL NOT in any like or related manner restrain or coerce employees or prospective employees of THE BABCOCK & WILCOX COMPANY, or of any other employer, in the exercise of rights under Section 7 of the Act.

WE WILL withdraw objections to the employment of members of Lodge 23 and make whole the following such members for the discrimination caused against them:

Stephen Mrazek
Walter Smith
Michael Duncovich
Joseph Marin

DISTRICT NO. 2, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, AFL
(Labor Organization)

Dated..... By.....
(Title of Officer)

Dated..... .....
(Business Agent)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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Section 8 (b) (2)	2, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 414

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 232 F. 2d 393. The findings of fact, conclusions of law, and order of the Board (Pet. App. B., R. 336–347, 265–312) are reported at 110 NLRB 2116.

JURISDICTION

The judgment of the court below was entered on June 6, 1956. A petition for rehearing was denied on June 6, 1956. The petition for a writ of certiorari was filed on September 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner union, by maintaining and performing a hiring agreement with the employer giving preference to members of the union, and causing the employer to refuse to hire four applicants because they were not members of the union, violated Section 8 (b) (2) and (1) (A) of the National Labor Relations Act.

2. Whether a "savings clause" in the agreement, in terms suspending the operation of any union-security provision in the contract prohibited by law, precluded a finding that petitioner had engaged in the unfair labor practices referred to in Question 1.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Petition, pp. 3–4.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

The Board found that petitioner had violated Sections 8 (b) (2) and (1) (A) of the Act by maintaining and performing an unlawful hiring agreement with the Babcock and Wilcox Company, herein called the Company, and by causing the Company pursuant to this agreement discriminatorily to refuse to hire four applicants for employment. The facts may be summarized as follows:

1. THE UNLAWFUL HIRING AGREEMENT BETWEEN PETITIONER AND THE COMPANY

The Company is engaged in the manufacture, sale, and installation of steam boilers and related products (R. 266; 8–9, 75–76). The present case arose during the Company's installation of steam boilers in Astoria, Long Island, New York, for the Consolidated Edison Company of New York (R. 266; 8–9). Petitioner and the Company executed a contract, effective July 1950 through June 1953, applicable to all Company projects within petitioner's "jurisdiction" (R. 274–275; 13–16). Section 1 of the contract provided that (*ibid.*):

> The Employer shall employ none but building construction members in good standing in the Union on all work * * * coming within the jurisdiction of [petitioner] District No. 2 * * *. The Employer further agrees that he will demand and see the working cards and Building Trades quarterly cards of Employees before employing them.

Petitioner agreed to supply "such competent mechanics and helpers as the Employer may reasonably require" and to permit its members to work with non-members "when the Union has failed to supply a sufficient number of mechanics and helpers" (*ibid.*). Section 39 of the contract further provided that (R. 277–278; 15–16):

> Any provisions of this Agreement which provide for Union Security or employment in a manner and to an extent prohibited by any

law or determination of any governmental board or agency, shall be and hereby is of no force and effect during the terms of said prohibition. It is understood and agreed, however, that if any of the provisions which are hereby declared to be of no force and effect because of restrictions imposed by law, are determined either by Act of Congress or other legislative enactment or by a decision of the court of highest recourse to be legal or permissible, then any such provisions shall immediately become or remain effective during the remainder of the term of this Agreement. The Union reserves the right to renegotiate any of the provisions, which may be of no force or effect. In the event that there shall be change in applicable laws as to Union Security, the parties shall renegotiate any provisions concerning Union Security.

In the event that any provisions of this Agreement shall be declared to be in violation of law, the remaining provisions of this Agreement shall remain in full force and effect.

The Company hired boilermakers at the Astoria project through its boilermaker foreman, John Hagan (R. 282; 156). Foreman Hagan, as required by the contract between petitioner and the Company, was a member in good standing of petitioner (R. 281; 161). As called for under the contract, Hagan, in his hiring practice, accorded preference to petitioner's members (R. 282; 166–169). After determining in consultation with the job superintendent how many boilermakers were needed at any given time, Hagan

would call petitioner's so-called Day Hall for men (R. 282; 156–157). If the hall could not supply the number of boilermakers needed, Hagan hired men who applied at the project gate, giving preference to members of petitioner, who were the only boilermakers in the area entitled to the Building Trades quarterly cards cited in Section 1 of the 1950 contract (R. 282; 156–159).[1] Hagan testified that he hired men from other locals affiliated with the International Brotherhood of Boilermakers only "if we did not have enough men" from petitioner (R. 283; 163). All boilermakers employed at the Astoria project were members of the International (R. 163; 160).

2. THE DISCRIMINATORY REFUSAL TO HIRE MRAZEK, SMITH, DUNCOVICH, AND MARIN

Mrazek, Smith, Duncovich, and Marin are members of Lodge 23 of the Boilermakers International. Lodge 23's charter from the International limits its work jurisdiction to the Brooklyn Navy Yard (R. 268; 80). Mrazek unsuccessfully applied for work at the Astoria job several times during December 1952 and also on January 5, 1953. Smith, Duncovich, and Marin were each refused employment by Foreman Hagan on January 8, 1953. The details concerning

[1] Petitioner and its constituent lodges are affiliated with the New York Building Trades Council (R. 268; 77, 82). The Trades Council issues quarterly cards to its component organizations, including District 2, for distribution to their membership (R. 268; 82). District 2 issues cards only to its members in good standing (R. 268; 80–81).

the discriminatory failure to offer employment to the four men are set forth below:

a. *Mrazek*

Mrazek worked at various building and construction jobs during 1952 and 1953 (R. 286; 57, 149). Mrazek was laid off from a building and construction job at Garden City on December 3, 1952, and the next day spoke to Hagan about his "chances of getting on" the Astoria job (R. 287–288; 136, 149). Hagan looked at Mrazek's Lodge 23 union book, asked whether Mrazek had a Building Trades card, and when Mrazek said he did not have one, said he was "sorry," that he needed men but that he could not put Mrazek to work without petitioner's permission (R. 288; 136–137). He advised Mrazek to go to petitioner's headquarters at 14th Street "and get the okay. I will put you on as soon as you come back" (*ibid.*). At petitioner's Day Hall next day, Mrazek told Field Representative Daniel Boylan[2] about his conversation with Hagan and asked Boylan for a job at the Astoria project (R. 288; 140). Boylan said he could do nothing since Mrazek did not have a Building Trades card (*ibid.*).

Mrazek applied for work at the job site several times in December 1952 and also on January 5, 1953

[2] Petitioner's three field representatives, Walter Graber, Charles Alexander, and Daniel Boylan, are officials of petitioner and its constituent lodges (R. 286; 38, 39, 52). They participate in contract negotiations, adjust job disputes and grievances, and send men out to jobs from the Day Hall (R. 286–287; 38, 95–96, 98–99). They are immediately responsible to petitioner's chairman, Harry Nacey (R. 286; 97).

(R. 288; 136–139). In addition to conversations with Hagan, he tried in vain to see petitioner's chairman, Harry Nacey, and also spoke to Field Representative Walter Graber concerning employment at Astoria (R. 288; 137, 141–143). Graber commented, "Look, you know what the score is; I don't have to tell you anything" (R. 288–289; 143).

Mrazek remained out of work until sometime in February 1953 when he expressed his willingness, while at the Day Hall, to accept employment in Newburgh, New York (R. 289; 148). He was sent to this job by a trustee of one of petitioner's constituent lodges (*ibid.*).

b. *Marin, Smith and Duncovich*

Marin and Smith are veteran boilermakers with building and construction experience (R. 289–290; 57, 102–103, 107, 112, 120–121, 125, 153–155). Smith had worked for Foreman Hagan in 1948 or 1949 (R. 289; 102). Marin and Smith asked Foreman Hagan for employment at the Astoria project on January 8, 1953 (R. 290; 103–104, 120). As with Mrazek, Hagan advised them that, since they were Lodge 23 members and did not have Building Trades quarterly cards, to get an "Okay" from petitioner's headquarters at 14th Street (R. 290; 104). The two men went to the 14th Street office and spoke to Field Representative Graber (R. 290; 104–105). Graber said he was "sorry" but that the jobs at the Astoria project were being held for members of petitioner who were "winding up on other jobs" (R. 290; 105). He agreed with

Smith's statement "we used to get jobs out of there [petitioner's Day Hall]," but explained that petitioner no longer "had an abundance of work to spread around" (R. 290–291; 105).

Duncovich also applied for work at the Astoria project on January 8 and received the same advice from Hagan to "go downtown and get fixed up. I can't do nothing for you" (R. 291; 125–126). That same day, Duncovich went to both the Day Hall at 23rd Street and petitioner's headquarters at 14th Street (R. 291; 126–127). He was advised by Field Representative Alexander at the Day Hall, and by Field Representative Graber at 14th Street, that no jobs were open (R. 291; 127). Graber also remarked that Hagan "should know better" than to send Duncovich to headquarters (R. 291; 127–128).

3. THE BOARD'S FINDINGS AND CONCLUSIONS OF LAW

On the facts summarized above, the Board found (R. 338, 291–294) that petitioner and the Company maintained and carried out an unlawful hiring arrangement giving employment preference to members of petitioner or other International Lodge members referred or cleared by petitioner. The Board further found (R. 338, 294–295) that the Company pursuant to this unlawful hiring arrangement discriminatorily refused employment to Mrazek, Smith, Marin, and Duncovich and that petitioner caused the Company so to discriminate against them. The Board concluded that by maintaining and performing its discriminatory contract with the Company, and by caus-

ing the Company to discriminate against the four men, petitioner violated Sections 8 (b) (2) and (1) (A) of the Act (R. 338, 295).

The Board rejected petitioner's contention that the preferential hiring provisions of the contract were not violative of the Act since the "savings clause" in the contract suspended their operative date. The Board held that whatever the significance of the "savings clause," the parties had in fact pursued a discriminatory hiring arrangement (R. 336, 291–292). The Board also rejected petitioner's further contention that its parent international had the right, under the proviso to Section 8 (b) (1) (A) of the Act, to determine the jurisdiction of its subordinate lodges and thereby fix the employment opportunities of members of these lodges. The Board held that the proviso, which protects a union's right to prescribe its own rules with respect to the retention or acquisition of membership therein does not permit discrimination with respect to employment on the basis of union membership or the lack of it (R. 336, 293–294).

B. THE DECISION OF THE COURT BELOW

The court below in separate opinions by Judges Frank and Lumbard, concurred in by Judge Waterman, affirmed the Board's findings and conclusions and enforced the Board's order in full (Pet. 19–23).

ARGUMENT

1. The record clearly supports the Board's finding, affirmed by the court below, that petitioner entered into a hiring arrangement giving employment prefer-

ence to its members and pursuant to that arrangement caused the employer to deny employment to the four complainants because they were not members of petitioner union. Such discriminatory action on the part of petitioner constitutes, as the court below correctly concluded, a clear violation of Section 8 (b) (2) and (1) (A) of the Act, and the case therefore presents no question warranting further review. *Radio Officers Union* v. *National Labor Relations Board,* 347 U. S. 17.

Petitioner's assertion (Pet. 15) that the hiring arrangement and the denial of employment to the four complainants had as its object "the employment of experienced workmen" as evidenced by their classification by the union in different locals rather than discrimination on the basis of membership or non-membership in the union is insubstantial. There is nothing in the record to show that the four complainants were not competent to perform the work for which they applied; indeed their employment history shows that they had pursued their trade as boilermakers in the building and construction industry as well as shipyard or navy yard boilermakers. Moreover, the four complainants were denied employment by the Company only because petitioner refused them clearance, and such clearance was refused not because the four applicants were lacking in experience or qualifications but because petitioner sought to preserve the job opportunities for its members (*supra,* pp. 7–8; R. 295).

Petitioner's reliance on *National Labor Relations Board* v. *Del E. Webb Construction Co.,* 196 F. 2d

702 (C. A. 8), as in conflict with the decision below, is misplaced. Apart from significant differences in the facts of the two cases, the *Del E. Webb* case, as pointed out by the court below (Pet. 21, n. 1) was overruled in all pertinent respects by the decision of this Court in *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17, 22–23 (n. 2), 52. See also the subsequent decision of the Eighth Circuit in *National Labor Relations Board* v. *International Union of Operating Engineers, Local No. 101,* 216 F. 2d 161.

Petitioner's further claim (Pet. 16–17) that the Board improperly inferred a discriminatory purpose from the circumstance that only union members were employed by the Company and that the decision below affirming this finding conflicts with *National Labor Relations Board* v. *Del E. Webb Construction Co.,* 196 F. 2d 841 (C. A. 8) is insubstantial. The short answer to this contention is that this evidentiary link in the Board's findings was merely one of many on which the Board relied, and the probative weight to be given to it in any case necessarily turns upon the surrounding circumstances of each case.

2. Equally without merit is petitioner's further contention (Pet. 18) that the "savings clause" of the agreement between the Company and the Union, which provided that any union security provisions in the contract prohibited by law were to be inoperative, precluded a finding of unfair labor practice with respect to the preferential hiring arrangement. In the first place, the Board found (R. 292), and the court

below agreed, that irrespective of the construction of the contract, "the actual employment practices in this case * * * operated as if [the "savings clause"] were not in the contract." Secondly, apart from the foregoing consideration, petitioner's contention is lacking in merit. As the court below stated in *National Labor Relations Board* v. *Gaynor News,* 197 R. 2d 719, 723–724, affirmed, 347 U. S. 17, in language equally applicable here—

> Very recently, in N. L. R. B. v. Red Star Express Lines [April 14, 1952], we held that a similar "saving clause"—if anything a more cautious one, providing that provisions of questionable legality under the 1947 amendments to the Labor-Management Act should not go into effect until held legal—would not suffice to prevent the agreement from constituting an unfair labor practice. Our reason was that an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract against this illegality. The same principles serve to void the union-security provisions here.

Accord: *National Labor Relations Board* v. *Knickerbocker Plastic Company,* 218 F. 2d 917, 923–924 (C. A. 9). There are no contrary decisions.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
MELVIN POLLACK,
Attorney,
National Labor Relations Board.

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In the Supreme Court of the United States

October Term, 1956.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

CLIF. LANGSDALE,
922 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

SMITH-GREEVES, LAW PRINTERS, KANSAS CITY, MO.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

In the brief of the National Labor Relations Board in opposition (p. 11), in arguing that there is no conflict between *N. L. R. B.* v. *Del E. Webb Construction Co.*, 196 F. 2d 702, and the instant case, the court is asked to consider the subsequent decision of the United States Court of Ap-

peals for the Eighth Circuit in *N. L. R. B.* v. *International Union of Operating Engineers, Local No. 101*, 216 F. 2d 161. The latter case does not mention the *Del E. Webb* case either directly or indirectly. Neither expressly nor impliedly does it overrule the *Del E. Webb* case.

While both Eighth Circuit cases involved discrimination in favor of members of Local 101 of the Operating Engineers and against members of Local 101-B, the *Del E. Webb* case was based on the character of 101-B as composed of apprentices ineligible for membership in Local 101, whereas in the later case 101-B is described, not as an apprentice local, but as composed of persons fully experienced and eligible for membership in Local 101. There is not one word in the opinion of the later Eighth Circuit decision which suggests that if the facts there disclosed had been the same as those appearing in the *Del E. Webb* case that the Eighth Circuit would not have applied the rule stated in the *Del E. Webb* case. Indeed, in the later case the Eighth Circuit emphasizes the absence of any difference in experience and qualification between members of Local 101-B and Local 101 (216 F. 2d at pages 162, 163). The court also pointed out that the members of Local 101-B "so far as appears from the record" were fully qualified for membership in Local 101 (at page 164). The two members of Local 101-B specifically involved in the case had sought to transfer their membership to Local 101 and had never received any satisfactory explanation for the failure of Local 101 to accept them.

For the foregoing reasons we respectfully submit that the later Eighth Circuit decision does not remove the *Del E. Webb* case from its position as a conflicting decision by a sister circuit. (See Pet., pages 14-16.)

The National Labor Relations Board evades the issue here presented when it argues that the four complainants

had such experience in the building and construction industry as to qualify them for the jobs which they were denied (Pet., page 10).

The Board may believe they had the requisite experience. But neither the union nor the employer to whom they applied for jobs ever passed on whether they had the requisite experience, because though members of the Boilermakers, they refused to apply for membership in the local which would fix their classification as experienced or inexperienced. The Board's rule would exclude unions from any role in cooperating with employers to maintain standards of experience for employment. It will destroy the whole fabric of the Union, which is built on the Constitution (Subordinate Lodge Constitution, Article I, Sections 1 and 2) enabling the Union to furnish employers with the best fitted mechanics for the work for which they are called.

Respectfully submitted,

CLIF. LANGSDALE,
922 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

October 11, 1956.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

CLIF. LANGSDALE,
929 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

SUPREME PRINTING CO. KANSAS CITY, MO.

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NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

No. 414.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

A new decision presenting a square conflict with the decision below has just been reported, namely, *N.L.R.B. v. International Union of Operating Engineers, Local No. 12*, decided October 9, 1956, by the United States Court of Appeals for the Ninth Circuit and unofficially reported, 38 L.R.R.M. 2776. We print the decision in full as an appendix hereto.

In the Ninth Circuit case, as in the instant case, the union, in cooperation with employers, obtained preference in employment for its members with previous employment experience in the "union's area jurisdiction." The Ninth Circuit set aside so much of the Board's order as rested on findings that such a system of preferential employment violated Section 8(b)(1)(A) and(2) of the Taft-Hartley Act. The court below upheld the Board's determination that such a system violated Section 8(b)(1)(A) and (2) of the Act.

Not only does this decision of the Ninth Circuit present a conflict with the decision below but it also shows that the issue presented is of increasing importance in the administration of the Taft-Hartley Act.

Respectfully submitted,

CLIF. LANGSDALE,
922 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Petitioner.

October 31, 1956.

APPENDIX.

U. S. Court of Appeals, Ninth Circuit (San Francisco)

National Labor Relations Board v. *International Union of Operating Engineers, Local No. 12, AFL*, No. 15003, October 9, 1956.

Petion for enforcement of an N.L.R.B. order (36 LRRM 1360, 113 N.L.R.B. 655). Order enforced as modified.

Theophil C. Kammholz, General Counsel, David P. Findling, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Arnold Ordman, and Frederick U. Reel, for petitioner.

David Sokol, of Los Angeles, Calif., for respondent.

Before STEPHENS, ORR, and HASTIE, Circuit Judges.

Full Text of Opinion.

ORR, Circuit Judge: The National Labor Relations Board, hereafter the Board, petitions this court to enforce its order against the International Union of Operating Engineers, Local No. 12, AFL, hereafter Local 12.

Local 12, together with other construction trade unions, has a collective bargaining agreement with Associated General Contractors, hereafter AGC. The legality of the agreement as such is not challenged in this cause.

The agreement provided that the union would establish and maintain an open and nondiscriminatory employment list in the work area jurisdiction of each respective Local Union of each particular trade. AGC members would first call the union when they needed men in certain work classifications. The agreement set up a priority system

for job referrals, with the highest priority for jobs going to workmen who had recently been laid off by AGC members who desired to re-employ the same workmen in the same area. Second choice went to workmen who had been employed by AGC members in the union's area jurisdiction during the previous ten years. The last group on the priority list were workmen whose names were entered on the lists in the area.

The agreement between the union and AGC also provided that all workmen covered by the agreement would become members of the union no more than thirty days after employment, and as a condition of employment.[1]

Dispatch System.

Based on the agreement, Local 12 operated a job referral dispatch system to supply the requirements of AGC members for operating engineers and allied classifications. The union maintained two referral lists; the first was headed "Members" and included all members of that union who had reported that they were seeking work. The second list was called "Applicants and Others," and included nonunion workmen who had applied at the dispatch office for work within the union's jurisdiction, and also members of other locals who had transferred into the geographical jurisdiction of Local 12.

The dispatcher would first examine the "Members" list for a workman of the classification desired; if none were available, the dispatcher would then go to the "Applicants and Others" list. An individual dispatched from the second listing made an application to join Local 12, and was required to pay a work permit fee of $2.50 per week, pursuant to the International Union's constitution,

[1] 29 U.S.C.A. §158(a)(3) authorizes such a provision.

which provision was not incorporated into the agreement with AGC.[2]

Pursuant to alleged grievances made by Frederick R. Hummel, Robert A. Holderby and Hoyt Covert, the General Counsel of the National Labor Relations Board issued a complaint against Local 12, alleging that the union was engaged in unfair labor practices affecting commerce within the meaning of §8(b)(1)(A) and (2) of the Labor Management Relations Act, and §2(6) and (7) of that Act.[3]

The alleged practices against Local 12 were the following: (1) operating the dispatch system to give preference to union members; (2) requiring nonunion applicants for employment to apply for union membership immediately upon referral; (3) imposing work permit fees on nonunion employees in AGC; and (4) discriminating against Robert A. Holderby in not giving him his fair share of job referrals because of his expulsion from the union.[4]

Theory of Examiner.

The Trial Examiner held the dual lists were in accord with the priority arrangement in the union security agreement, in that only union members would have worked for AGC contractors within the past ten years, and would qualify for the second tier of priority. The Trial Ex-

[2]Article XV, §3(e) of the International Union's constitution provides: "Each Local Union permitting its applicants for membership to engage at the craft, upon work under contract with, or control of, said Local Union, shall charge to and collect from each such applicant, and each such applicant shall be required to pay to it for the period involved, minimum weekly permit dues of $2 in the case of each applicant hoisting and portable engineer or apprentice, and minimum monthly permit dues of $2 in the case of each applicant stationary engineer or apprentice, and shall thereupon issue to each such applicant a temporary permit similar to the Journeymen Engineer's Temporary Permit provided in this Article."

[3]29 U.S.C.A. §158(b)(1)(A) and (2), and §152(6) and (7).

[4]The complaints by Hummel and Covert appear to have been dismissed.

aminer found that there was no proof that the signing of an application for membership in the union was a condition precedent to the securing of a referral; and that there was no showing that the signing was not with the individual applicant's consent and for his individual convenience, in that he had to join within thirty days of his employment with an AGC contractor.

With respect to Holderby, the Examiner found a correlation between his suspension from the union and lack of work referrals, but held that it was incumbent upon the General Counsel to show the availability of employment for which the claimant was qualified and a refusal by Local 12 to refer him thereto, in order to show discriminatory treatment within the meaning of the Act.[5] The Trial Examiner recommended that the charges be dismissed.

Theory of Board.

The Board refused to follow the recommendation of the Trial Examiner, and ordered the union to cease and desist from the practices complained of, and to make Holderby whole for the discrimination against him.

The Board determined that as a matter of practice union members were given job preference, citing Holderby as an example. He had been discharged from the union

[5]The Trial Examiner's Intermediate Report stated: "Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint therein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, i.e., the "Applicants and Others" list. Then, when it becomes apparent that he will not drop the charge, but will continue the case, the supply of jobs is shut off just as abruptly as it was started. There is no evidence that jobs suddenly became more available in June, that jobs had not been available all along, and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors."

and his name removed from the preferred list, despite his preferential status as a former worker within the AGC unit. The Board also found that nonunion employees in fact could not exercise a free choice between applying for union membership immediately, or after the first thirty days of employment; that job applicants were aware that their only chance of obtaining employment with AGC employers was through Local 12's dispatching office, and thus were impliedly coerced into cooperation with the union and its membership practices. The Board also found that the permit fees charged nonunion members was a discrimination against them, since union workers were not charged such fees. It found that there was a lack of proof that the special charge levied upon the nonunion applicants was in any manner related to the cost of operating the dispatch system for their benefit.

An attempt to cause an employer to discriminate against an employee in violation of §8(a)(3) constitutes a violation of §8(b)(2) even though the employer did not as a matter of fact discriminate.[6] See N.L.R.B. v. International Longshoremen's and Warehousemen's Union et al., 9 Cir., 210 F. 2d 581, 583, 33 LRRM 2540, where it is said:

> "* * *
>
> Thus a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct, which, if committed, would violate §8(a)(3)."

[6] 29 U.S.C.A. §158(b) provides: "It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring and retaining membership."

See also Radio Officers v. N.L.R.B., 347 U. S. 17, 53, 33 LRRM 2417; and N.L.R.B. v. Auchter Company, 5 Cir., 209 F. 2d 273, 277, 33 LRRM 2386.

We have reviewed the Board's findings to determine whether there is substantial evidence to support them and in so doing considered not only that which supports, but also whatever in the record fairly detracts from its weight. The scope of our review includes the findings of the Trial Examiner, since it is part of the record, and deserves some weight because of his opportunity to have observed the demeanor of the witnesses.

> "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." Universal Camera Corp. v. N.L.R.B., 340 U. S. 474, 496, 27 LRRM 2373.

Thus viewing the entire record we find no support for the Board's findings of unfair labor practices alleged to have been committed by the labor union, with the exception of acts of discrimination against Holderby.

Operation of System.

The record discloses as to the alleged discriminatory operation of the dispatch system that although the system devised by the union for preference in referrals could conceivably admit of a discrimination against a nonunion workman, there was no evidence of a scheme or practice of discrimination by the union. The only instance of that kind shown was that of Holderby, and a single isolated

incident of this type cannot support a cease and desist order. See N.L.R.B. v. Amalgamated Meat Cutters, 9 Cir., 202 F. 2d 671, 31 LRRM 2472.

The Trial Examiner found adverse to the petitioner on this contention because of lack of evidence to support the claim. We think he was correct.

With respect to the alleged requirement that nonunion applicants take out union membership applications on their first referral the Trial Examiner's holding was that there was no showing of a requirement as a "practice" by the union.[7] The convenience of an immediate application under the thirty-day period is obvious, and it was necessary to establish by competent evidence that the union actually required this of nonunion workers in order to support a finding of an unfair labor *practice* within the meaning of the Act. We agree with the Trial Examiner as to lack of evidence on this point.

There is no evidence in the record with respect to the work permit fees being required of nonunion workers, except that such a provision is contained in the Constitution of the International Union of Operating Engineers. It is not established, first that Local 12 was requiring such fees, and second, that said fees were not a reasonable charge for operating the dispatch system, and hence not a discriminatory practice against nonunion members.

---

[7]The Trial Examiner's Intermediate Report stated: "* * * The fact that it was the 'practice' to have such an employee sign an application for membership at the time of his first referral is not proof that the signing of such an application for membership was a condition precedent to the securing of the referral—which, if true, would be definitely a violation of the Act. However, there is no showing in this case of any such illegal requirement. Nor is there any showing here that this signing was not with the individual employee's consent and for his individual convenience.

"* * *

"In the absence of proof that the making of application for membership and the payment of all or a part of the fee was a condition precedent to the referral to the job, the undersigned would be guessing and conjecturing, if he held such an indefinite 'practice' to be violative of the Act."

There is sufficient evidence to support the Board's finding of a discrimination against Holderby. The pattern of job referrals shown in evidence, coupled with the "switch" of his name from the "Members" list to the "Applicants and Others" list, warrants a finding of discrimination in violation of 29 U.S.C.A. §158(b)(2).* Holderby's applications were handled in a manner giving rise to a strong conviction that the union and Holderby were bitterly antagonistic, one to the other. The time intervals between the job referrals given Holderby are significant. After he instituted legal action against Local 12, his referrals were more frequent, evidently in an attempt at appeasement; but when Holderby refused to discontinue the legal action, the referrals again became infrequent. This circumstance is persuasive.

Under the circumstances the order of the Board is too broad. The Board is ordered to modify its order so as to require respondent Local 12 to make Holderby whole, the amount thereof to be determined in post-decree compliance proceedings. See N.L.R.B. v. Local 803, International Brotherhood of Boilermakers, etc., 3 Cir., 218 F. 2d 299, 35 LRRM 2355. In all other respects the order of the Board is set aside.

Cause remanded to the Board with directions to modify its order in accordance with the views herein expressed, and the order so modified is ordered enforced.

Dissenting Opinion.

HASTIE, Circuit Judge, dissenting in part: This court is enforcing against the defendant labor union so much of an order of the National Labor Relations Board as gives effect to the board's conclusion "that by removing Holderby's name from the 'Members' list because of his ex-

*See Note 5, supra.

pulsion from the Union, thereby denying him equal access to jobs, the Respondent * * * violated Section 8(b)(2) and (1)(A) of the Act." While this language places formal reliance upon two clauses of Section 8(b), namely clauses (2) and (1)(A),[1] the opinions of the board and this court make it clear that both tribunals have analyzed the Holderby matter as essentially a violation of clause (2) without reference to the different considerations upon which an invocation of clause (1)(A) must depend.

To make my view of the matter clear, I shall consider those clauses separately. Cf. National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937, 943-44, 33 LRRM 2799.

Section 8(b)(2).

I think the union's action with reference to Holderby did not constitute a violation of clause (2) of Section 8(b). The issue under that clause is whether the union caused or attempted to cause any employer to discriminate against Holderby in violation of the Act. In resolving that issue it must be determined whether the union caused or attempted to cause an "employer to engage in conduct which, if committed, would violate Section 8(a)(3)."[2] Radio Officers' Union v. National Labor Relations Board, 1954, 347 U. S. 17, 53, 33 LRRM 2417.

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[1]Section 8(b) of the National Labor Relations Act, as amended, 61 Stat. 140, as amended, 65 Stat. 601, 29 U.S.C. §158(b)(1)(A) and (2), reads in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section * * *"

[2]That subsection makes it an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *" 29 U.S.C. §158(a)(3).

In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer's attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holdeby without causing or attempting to cause any employer to act improperly in any way.

In this all-important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2). Those cases characteristically reveal either aggressive wrongdoing by the employer himself or his acquiescence and cooperation in making misconduct on the part of the union injurious to some employee.[5]

National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, 9th Cir. 1954, 210 F. 2d 581, 33 LRRM 2540, deserves special mention because it is a very recent decision of this court. But there too the employer was chargeable with knowledge of and responsibility for the misconduct of certain wrongdoing dispatchers, because those dispatchers were employees of the employer as well as the union and were subject to removal by an employer-union committee.

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[5] See e.g. National Labor Relations Board v. Local 803, International Brotherhood of Boilermakers, AFL, 3d Cir. 1955, 218 F. 2d 299, 35 LRRM 2355 (On union demand the employer fired and refused to hire men not in good standing in the union); National Labor Relations Board v. International Union of Operating Engineers, Local 101, AFL, 8th Cir. 1954, 216 F. 2d 161, 35 LRRM 2060 (Employees discharged in accordance with union seniority rules though employer's rules provided otherwise); National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937, 33 LRRM 2799 (Union caused employer to withdraw job offer); National Labor Relations Board v. George Auchter Co., 5th Cir. 1954, 209 F. 2d 273, 33 LRRM 2386 (Employer refused to employ applicant because of union's refusal to issue referral); National Labor Relations Board v. Bell Aircraft Corp., 2d Cir. 1953, 206 F. 2d 235, 32 LRRM 2550 (Employee denied promotion because union charges pending against him).

In the present case the board has made a passing, but in my view unsuccessful, effort to charge employer complicity in or responsibility for the union's alleged wrongdoing. In a footnote the board refers to the employer's duty "to insist that the union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists." I think it would be unfair and irrational to impose such a duty unless and until the employer is at least put on notice that the union is improperly discriminating against someone in the making of referrals. And I know of nothing in the Act or its history that suggests legislative intention to burden the employer with ferreting out union misconduct on penalty of being charged with complicity in that which he has not discovered.

The foreging analysis leads me to agree with the member of the board who dissented in this case that the record does not establish a violation of Section 8(b)(2).

Section 8(b)(1)(A).

The problem presented under Section 8(b)(1)(A) is different. That clause makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of freedom of choice in matters of organization, bargaining and concerted activities. The opinion of the board does not address itself to this aspect of the union's dealings with Holderby. We are not told upon what facts the Board relies or how it has arrived at the conclusion that a violation of this clause is established on the present record. This deficiency is a matter of concern because the record does not make it clear why Holderby was dropped from the union or why his subsequent request for reinstatement was denied. It does appear that his controversy with the union has reached the stage of litigation in the

state courts. It is not clear whether a violation of clause (1)(A) should have been, or would have been, found had the Board directed its attention with particularity to that clause rather than clause (2).

In these circumstances, I would send the case back to the board for the specific purpose of reconsidering the Holderby matter solely as a possible violation of clause (1)(A). I would withhold judicial review of this issue until the considered judgment of the board is revealed by findings and conclusions which place the matter and the board's view of it in clear focus. In all other particulars I would deny the petition for enforcement.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 414

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS AND HELPERS OF AMERICA, A. F. L., DISTRICT NO. 2, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This memorandum is submitted in response to petitioner's supplemental brief, which calls to the Court's attention the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *International Union of Operating Engineers, Local No. 12,* decided October 9, 1956 (38 L. R. R. M. 2776). Petitioner asserts that the latter decision presents "a square conflict" with the Second Circuit's decision in the instant case.

The Board submits, however, that the claimed conflict does not exist. The cases are plainly distinguish-

able on their facts, and there is no disagreement between the Second and Ninth Circuits as to the applicable legal principles established by Section 8 (b) (1) A and (2) of the National Labor Relations Act.

In the instant case, the Board found that the employer and the petitioner union entered into a preferential hiring arrangement which was discriminatory on its face and that pursuant to this unlawful hiring arrangement the union had caused the employer to discriminate against various applicants for employment because of their non-membership in the union. The court below sustained these findings as adequately supported by the record (Pet. Exh. A., pp. 20, 22–23). In the *Operating Engineers* case, the collective bargaining agreement between the employer and the union provided for a hiring arrangement whereby the union would dispatch workers to the employer. The Board, without passing on the legality of the hiring arrangement, found that the union had operated the hiring arrangement in a discriminatory fashion in violation of the Act. The Ninth Circuit, however, disagreeing with the Board, held that "The record discloses as to the alleged discriminatory operation of the dispatch system that although the system devised by the union for preference in referrals could conceivably admit of a discrimination against a nonunion workman, *there was no evidence of a scheme or practice of discrimination by the union.* [Emphasis added.]" (Supp. Br. App., p. 8.)

The different conclusions reached in the two cases thus rest upon the differing facts found by the reviewing courts to exist in each case, and there is no conflict as to the proper construction of the Act calling for resolution by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

NOVEMBER 1956.

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